No. 75-811

In the Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
DEC 5 1975
MICHAEL RODAK, JR., CLERK

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL., PETITIONERS

v.

ROOSEVELT F. PALMORE

C. L. SWAIN, SUPERINTENDENT, LORTON REFORMATORY, PETITIONER

v.

JASPER C. PRESSLEY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

ANDREW L. FREY,
Deputy Solicitor General,

PAUL L. FRIEDMAN,
Assistant to the Solicitor General,

JEROME M. FEIT,
JOSEPH S. DAVIES, JR.,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	3
Question presented	3
Constitutional and statutory provisions involved	3
Statement	4
1. *Palmore* v. *Superior Court*	4
2. *Pressley* v. *Swain*	8
3. The court of appeals' opinions	10
Reasons for granting the writ	15
Conclusion	27
Appendix A	1a
Appendix B	53a
Appendix C	55a
Appendix D	57a
Appendix E	64a
Appendix F	66a
Appendix G	67a
Appendix H	70a

CITATIONS

Cases:

Accardi v. *Blackwell*, 412 F.2d 911	21
Angarano v. *United States*, 312 A.2d 295 petition for rehearing denied, 329 A.2d 453	19

Cases—Continued

	Page
Cain v. *Markley*, 347 F.2d 408	21
Caminetti v. *United States*, 242 U.S. 470	22
Galente, Application of, 437 F.2d 1164	21
Herbert v. *United States*, 340 A.2d 802	19
Hill v. *United States*, 368 U.S. 424	23
International Association of Machinists v. *Street*, 367 U.S. 740	25
McCall v. *Swain*, 510 F.2d 167	20
Palmore v. *United States*, 411 U.S. 389	4, 6, 14, 17, 19
Palmore v. *United States*, 290 A.2d 573	5
Sanders v. *United States*, 373 U.S. 1	23
United States v. *DeCoster*, 487 F.2d 1197	19
United States v. *Hayman*, 342 U.S. 205	23
United States v. *Morgan*, 346 U.S. 502	23
United States v. *Robinson*, 471 F.2d 1082, reversed, 414 U.S. 218	19
United States v. *Simmons*, 302 A.2d 728	19

Constitution and statutes:

United States Constitution:	
Article I, Section 9, Clause 2	7, 26, 70a
Article III, Section 1	6, 7, 70a
Fifth Amendment	7, 26, 71a
Sixth Amendment	9
28 U.S.C. 1257(2)	5
28 U.S.C. 2241, *et seq.*	9, 71a
28 U.S.C. 2255	4, 13, 15, 19, 22, 23, 76a
11 D.C. Code 102	17
22 D.C. Code 2201	8
22 D.C. Code 2206	8
23 D.C. Code 110	7-8, 13, 19, 20, 22, 26, 78a

Constitution and statutes—Continued

	Page
23 D.C. Code 110(a)	6, 20, 78a
23 D.C. Code 110(g)	3, 6, 7, 11, 12, 13, 15, 20, 21, 22, 23, 25, 79a

Miscellaneous:

Friendly, *Benchmarks* (1967)	25
H.R. Rep. No. 91-907, 91st Cong., 2d Sess. (1970)	17, 22-23
Rauh and Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970*, 20 Am. U. L. Rev. 252 (1970)	24
S. Rep. No. 91-405, 91st Cong., 1st Sess. (1969)	17, 22
2A Sutherland, *Statutes and Statutory Construction*, §§ 46.01, 46.06 (4th ed. 1973)	22
Williams, *District of Columbia Court Reorganization, 1970*, 59 Geo. L. J. 477 (1971)	24
2 Wright, *Federal Practice and Procedure* (1969)	23

In the Supreme Court of the United States

OCTOBER TERM, 1975

No.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL., PETITIONERS

v.

ROOSEVELT F. PALMORE

C. L. SWAIN, SUPERINTENDENT, LORTON REFORMATORY, PETITIONER

v.

JASPER C. PRESSLEY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Superior Court of the District of Columbia, the Attorney Gen-

eral of the United States, the Director of the District of Columbia Department of Corrections, and the Superintendent of the Lorton Reformatory,[1] petitions for writs of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit in the above-captioned cases.

OPINIONS BELOW

The opinion of the court of appeals in *Palmore* v. *Superior Court of the District of Columbia, et al.* (App. A, *infra*) is reported at 515 F.2d 1294. The district court's order in that case, discharging the rule to show cause and dismissing the petition for a writ of habeas corpus (App. C, *infra*), is unreported. The opinion of the court of appeals in *Pressley* v. *Swain* (App. D, *infra*) is reported at 515 F.2d 1290. The district court's order in that case, discharging the rule to show cause and dismissing the petition (App. F, *infra*), and its memorandum opinion (App. G, *infra*), are unreported.

[1] In *Palmore*, the Attorney General of the United States was named as a party-respondent in the petition for a writ of habeas corpus. In *Pressley*, neither the United States nor the Attorney General was named as a party. However, by long-standing agreement, when the complaint in a habeas corpus petition relates to the validity of an underlying conviction secured by the United States, the United States Attorney for the District of Columbia represents the Lorton Reformatory or the District of Columbia Department of Corrections; otherwise they are represented by the Corporation Counsel for the District of Columbia.

JURISDICTION

The *en banc* judgments of the court of appeals in *Palmore* (App. B, *infra*) and in *Pressley* (App. E, *infra*) were entered on July 9, 1975.[2] By order of October 29, 1975, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 6, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the federal district courts have jurisdiction to entertain habeas corpus petitions by persons convicted of violations of the District of Columbia Code in the Superior Court of the District of Columbia.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

23 D.C. Code 110(g) provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate

[2] On November 12, 1975, the court of appeals in both cases granted motions to stay its mandates and to stay the reissuance of its judgments to and including December 6, 1975.

or ineffective to test the legality of his detention.

The comparable portion of 28 U.S.C. 2255 provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Other relevant constitutional and statutory provisions are set forth in Appendix H, *infra*.

STATEMENT

1. *Palmore* v. *Superior Court.*

After a non-jury trial in the Superior Court of the District of Columbia, respondent was convicted on March 31, 1971, of violating the felony provision of 22 D.C. Code 3204 by carrying a pistol without a license after previously having been convicted of a felony.[3] On April 27, 1971, he was sentenced to a

[3] As set out in this Court's opinion in *Palmore* v. *United States*, 411 U.S. 389, the facts giving rise to this conviction are as follows: In January of 1971, two officers of the District of Columbia Metropolitan Police Department observed a moving automobile with license tags indicating that the vehicle was rented. The officers stopped the vehicle for a spot-check of the driver's license and car-rental agreement. Respondent Palmore, the driver of the vehicle, produced a

term of imprisonment for two to six years. Execution of all but six months of the sentence was suspended, and respondent was placed on probation for six years.

Prior to trial, respondent moved to dismiss the indictment on the ground that the Superior Court lacked jurisdiction to try him for a felony, alleging that only Article III judges with life tenure and salary protection could constitutionally exercise jurisdiction over the trial of a felony based on a law passed by Congress. He also moved to suppress the pistol seized from the car he was driving when stopped by the police, on the ground that the gun was discovered as the result of an unlawful search. The motions were denied. Following an appeal based on these claims, the District of Columbia Court of Appeals affirmed respondent's conviction. *Palmore* v. *United States*, 290 A.2d 573 (D.C. App.). Respondent then appealed to this Court pursuant to 28 U.S.C. 1257(2).

This Court concluded that since the District of Columbia "is constitutionally distinct from the states" (*Palmore* v. *United States*, 411 U.S. 389, 395), an appeal could not be taken under Section 1257(2). However, the court treated Palmore's jurisdictional statement as a petition for a writ of certiorari and granted the petition, limited to the question whether

rental agreement from the glove compartment of the car and explained why the car appeared to be, but was not, overdue. Meanwhile, one of the officers observed the hammer mechanism of a gun protruding from under the armrest in the front seat of the vehicle. Respondent was thereupon arrested.

Palmore was required to be tried by a court ordained and established in accordance with Article III, Section 1, of the Constitution (411 U.S. at 396-397). On that question, the Court held that "there is no support * * * in either constitutional text or in constitutional history and practice" for the view that criminal offenses under laws passed by Congress may not be prosecuted except in courts established pursuant to Article III (411 U.S. at 400).

Thereafter, on May 15, 1973, Palmore filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia, naming as respondents the Superior Court of the District of Columbia, the Attorney General of the United States and the Director of the District of Columbia Department of Corrections.[4] The petition was based on the same Fourth Amendment claim Palmore had pursued on direct appeal to the District of Columbia Court of Appeals. On July 10, 1974, the district court dismissed the petition on the ground that Congress had deprived it of jurisdiction by providing in 23 D.C. Code 110(a) that post-conviction collateral attacks against convictions of the Superior Court of the District of Columbia were to be made to that court, and also by the express provision of Section 110(g) that an application for a writ of habeas corpus "shall not be entertained by * * * any Federal or State court if it appears that the applicant has failed to make a motion for relief under [Section 110] or that the

[4] Then, as now, respondent was on bond pending appeal.

Superior Court has denied him relief * * *" (App. C, *infra*, pp. 55a-56a).[5]

Palmore appealed to the United States Court of Appeals for the District of Columbia Circuit, contending (1) that Congress did not intend 23 D.C. Code 110(g) to bar the United States District Court from entertaining collateral attacks against convictions obtained in the Superior Court, and (2) that if Section 110(g) contained such a jurisdictional limitation, it was unconstitutional under the Suspension Clause of the Constitution (Article I, Section 9, Clause 2) and under principles of equal protection embodied in the Due Process Clause of the Fifth Amendment. These contentions were based on the premise that persons convicted under a criminal statute passed by Congress are or at least may be constitutionally entitled to collateral review of their convictions by Article III judges.

Over the dissent of one judge, the court of appeals, sitting *en banc*, held that Section 110(g) was not a limitation on the power of the United States District Court to entertain collateral attacks against convictions of the Superior Court, but only an exhaustion of remedies provision requiring initial submission of post-conviction claims to the local courts. Finding that Palmore had exhausted his remedy under Sec-

[5] The district court also noted (App. C, *infra*, p. 56a) that Palmore was "authorized by Title 23, D.C. Code § 110(a) to apply for relief by motion but has failed to do so" and that "there is no showing that the Superior Court has denied him relief or that the remedy by motion is inadequate or ineffective to test the legality of his detention * * *."

tion 110 by his appeal, the court of appeals reversed the judgment of the district court and remanded the case to that court for a decision on the merits of Palmore's Fourth Amendment claim (App. A, *infra*).

2. *Pressley* v. *Swain*.

Following a jury trial in the Superior Court of the District of Columbia, respondent Pressley was convicted on April 22, 1971, of grand larceny, in violation of 22 D.C. Code 2201, and of larceny from the District of Columbia government, in violation of 22 D.C. Code 2206. On October 1, 1971, he was sentenced to concurrent prison terms of 32 to 96 months on the grand larceny conviction and 20 to 60 months on the conviction for larceny from the District of Columbia government. On appeal, respondent contended that inconsistencies between the testimony of two government witnesses concerning the physical appearance of the typewriter he was alleged to have stolen reflected perjury by one of them. On May 22, 1972, the District of Columbia Court of Appeals affirmed his conviction in an unpublished order, stating that "the record disclosed no error affecting the substantial rights of appellant" (App. D, *infra*, p. 58a).

On June 5, 1972, respondent filed an untimely *pro se* motion for a new trial in the Superior Court, claiming ineffective assistance of counsel because his attorney had failed to move for suppression of the typewriter respondent allegedly had stolen. The court denied the motion. Setting forth its reasons in some detail, on March 2, 1973, the District of Columbia

Court of Appeals affirmed the Superior Court's order denying the motion. During the pendency of the appeal, Pressley filed a *pro se* motion in the Superior Court to compel production of the grand jury voting record in his case. On September 8, 1972, the motion was denied by the trial court on the ground that it lacked jurisdiction. On June 6, 1973, the District of Columbia Court of Appeals affirmed the Superior Court's denial of the motion, not on the jurisdictional grounds on which the Superior Court had relied, but on the merits[6] (App. D, *infra*, pp. 58a-59a).

On May 11, 1973, respondent, who was then serving his sentence at the Lorton Reformatory in Lorton, Virginia, filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. 2241, *et seq.*, in the United States District Court for the District of Columbia.[7] The petition was directed against C. L. Swain, the Superintendent of the Lorton Reformatory. It alleged that Pressley, who had been represented by counsel of his choice at trial, was denied the effective assistance of counsel guaranteed by the Sixth Amendment[8] (App. D, *infra*, p. 59a). After a hearing on the question of the court's jurisdiction to entertain the petition, the district court entered an order on

---

[6] Each of respondent's three appeals was fully briefed and argued by appointed counsel.

[7] Respondent has since been released from custody and was placed on parole on January 1, 1974. His parole is due to expire on April 21, 1979.

[8] His claim in this regard raised issues in addition to that raised in his motion for a new trial in the Superior Court.

July 19, 1973, dismissing the petition for want of jurisdiction "by virtue of 23 D.C. Code § 110(g)" (App. F, *infra*, p. 66a). Respondent appealed.

On October 30, 1974, the United States Court of Appeals for the District of Columbia Circuit, *sua sponte*, remanded the record to the district court to clarify its order of dismissal. On November 12, 1974, the district court "respectfully advise[d] that on the papers then before it, it appeared that appellant had not adequately exhausted his remedies in the local court system. The Court made no determination as to the constitutionality of 23 D.C. Code § 110" (App. G, *infra*, p. 67a). The district court concluded only that "[i]t was not apparent that the suppression issue had ever been analyzed and there were aspects of the adequacy of counsel not passed upon at the local level. The writ should have been initially filed in the local courts" (*id.* at 68a-69a). The court "did not feel the question of the ultimate effect of 23 D.C. Code § 110 upon the viability of a further writ of habeas corpus in the District Court was ripe for decision in this case" (*ibid.*).

Pressley appealed to the United States Court of Appeals for the District of Columbia Circuit. That court *en banc*, again over the dissent of one judge, reversed the judgment of the district court and remanded the case for a decision on the merits (App. D, *infra*).

3. The Court of Appeals Opinions.

In a lengthy opinion, the court of appeals began its analysis in the *Palmore* case with the premise that

"statutes should be interpreted to avoid difficult constitutional questions" (App. A, *infra*, p. 5a). It therefore rejected the government's "clear meaning construction" of 23 D.C. Code 110(g), saying that such a construction "may have a significant impact on the traditional [habeas corpus] jurisdiction of certain article III courts" (*id.* at 10a-11a), would divest this Court of jurisdiction to entertain motions for original writs of habeas corpus (*id.* at 12a), and would raise questions "whether by singling out those convicted of local District of Columbia crimes for eliminating access to article III courts Congress has violated the concept of equal protection of law" (*id.* at 14a).

The court found no "clear or simple resolution" (App. A, *infra*, p. 20a) of the conflicting views of the parties regarding the Suspension Clause, expressed concern that discretionary review by this Court "as the sole protection of important interests may be both inadequate and impracticable" (*id.* at 21a), and noted that while the Superior Court "is undeniably a federal court in the sense that it was *created* by Congress, it is not a federal court as *defined* by Congress in the Court Reform Act" (*ibid.*). The court concluded that these "significant 'variable[s]' " required rejection of the Government's " 'clear meaning' approach to the statute" (*id.* at 22a).

On the equal protection question, the court defined the right that Palmore was asserting as "the guarantee to have his claim heard in an article III court" (App. A, *infra*, pp. 24a-25a). It questioned whether

Section 110(g) is a means sufficiently related to the overriding purpose of the Court Reform Act—to reorganize the administration of criminal justice in the District of Columbia to help alleviate the crime problem—as to be constitutional (App. A, *infra*, p. 26a). It also noted that, under the government's theory, Section 110(g) only divests the district court of jurisdiction to hear post-conviction writs, not pre-trial petitions, and it expressed uncertainty over whether any rational justification could be advanced for this classification (*id.* at 26a-27a).

Turning to the legislative history, the court said it found nowhere in the legislative history "an explicit reference or even a suggestion that section 110 was to have the jurisdictional impact that the district court accorded it" (App. A, *infra*, p. 28a). Rather, it found the legislative intent behind Section 110 to be the provision of a detailed statutory collateral attack remedy in the Superior Court, in order not to leave that court to rely solely on its inherent power (*id.* at 29a-31a). In sum, the court found nothing to indicate a congressional intent to eliminate "by implication" the habeas corpus remedy in the Article III federal courts and in this Court (*id.* at 30a). It found significant the fact that Congress sought in the Court Reform Act to create a court of general local jurisdiction like those of the States and to make the federal district court more like federal district courts elsewhere (*id.* at 33a-38a). "The only construction of section 110 consistent with this [state-federal] analogy, is that Congress never intended to

affect the district court's habeas jurisdiction" (*id.* at 35a).

Finally, the court (App. A, *infra*, pp. 42a-45a) analogized the situation presented by these cases to other cases involving other statutes, particularly those involving the military justice system, in which this Court has rejected a statutory construction that "raised the spectre that recourse through habeas corpus to the article III courts to test the legality of detention would not be available" (*id.* at 42a).

Reiterating its premise that "courts should interpret statutes to avoid difficult constitutional questions and that the constitutional questions raised are both novel and difficult," the court concluded "that Congress never intended to, nor does section 110 actually, affect the district court's jurisdiction to entertain post-conviction habeas petitions from local prisoners" (App. A, *infra*, p. 45a). "Instead, we hold that section 110(g) is an exhaustion of remedies statute, requiring initial submission of claims to the local courts and marking * * * the terminal point for proceedings in the local court system" (*ibid.*).

Judge Robb dissented. He first stated his belief that the "plain language [of Section 110(g)] means exactly what it says," and he rejected "the premise upon which the majority avoids what it considers to be difficult constitutional questions" (App. A, *infra*, p. 49a). Turning to those questions, Judge Robb noted that the relief available in the Superior Court under 23 D.C. Code 110 is the equivalent of that available in a United States District Court under 28

U.S.C. 2255; since the scope of Section 2255 is "exactly commensurate" with the scope of habeas corpus, "the relief defined in section 110, therefore, is the equivalent of federal habeas corpus relief" (*id.* at 50a). Thus, said Judge Robb, the entire question "is reduced to the difference in the tenure and salary protections accorded District Court and Superior Court judges" (*ibid.*).

That question he found answered in the principles of this Court's decision in *Palmore* v. *United States*, 411 U.S. 389 (App. A, *infra*, pp. 50a-51a). For if the District's Article I courts are competent to administer its criminal justice system in the first instance, they are also "competent to dispense collateral post-conviction relief exclusive of the habeas corpus jurisdiction of Article III courts" (*id.* at 51a). On the equal protection question, Judge Robb concluded in somewhat the same vein that if there is no "invidious discrimination" when a person in the District of Columbia is tried in an Article I court under this Court's decision in *Palmore*, "it follows that it is not a denial of equal protection when that person is required to present his application for collateral relief to an Article I District of Columbia court" (*id.* at 51a-52a).

In its opinion in *Pressley*, the court of appeals concluded that Pressley had "exhausted his local remedies by first pursuing his claim through a motion under section 110"[9] (App. D, *infra*, p. 62a), and it

[9] This conclusion is open to serious question. See pp. 8-9, *supra*.

therefore held that the district court erred in dismissing the petition on exhaustion grounds (*id.* at 61a-63a). Then, following its decision in *Palmore*, the court reversed and remanded the case for consideration by the district court on the merits (*id.* at 63a). Judge Robb again dissented.

REASONS FOR GRANTING THE WRIT

Despite the clear language of 23 D.C. Code 110(g) generally prohibiting "any Federal or State Court" from entertaining habeas corpus applications seeking to overturn judgments of conviction of the Superior Court of the District of Columbia, the court of appeals in these cases held that Congress did not intend to make the Superior Court the exclusive forum for collateral attacks on its judgments and that habeas corpus is available in the United States District Court. These decisions will have a significant impact upon the allocation of jurisdiction and final review power between the two court systems in the District of Columbia and will undercut the congressional policy embodied in the District of Columbia Court Reform and Criminal Procedure Act. Moreover, the construction placed on the statute by the court of appeals in an effort "to avoid difficult constitutional issues" so far departs from established principles of statutory construction, and so clearly disregards the meaning previously given by this Court to the identical statutory language of 28 U.S.C. 2255, as to warrant review by this Court.

One extraordinary aspect of this case that, we submit, makes it especially important that this Court resolve the question we present, is that that question implicates a fundamental dispute between the Superior Court of the District of Columbia, one of the petitioners herein, and the District's federal courts. As the matter now stands, this dispute over allocation of judicial powers has, in effect, been determined by one of the competing claimants. While we recognize that it was both necessary and entirely proper that the court of appeals decide the issue in the context of these cases, final resolution of the question by the Supreme Court is especially appropriate in the circumstances.

1. The decisions of the court of appeals in these cases, if allowed to stand, will dramatically alter the allocation of jurisdiction and final review power between the two court systems in the District of Columbia and will undercut the congressional policy embodied in the District of Columbia Court Reform and Criminal Procedure Act of 1970. Those decisions will mean that the United States Court of Appeals for the District of Columbia Circuit will again have the authority to review the actions of the local court system, despite the fact that one of the major purposes of court reorganization was to eliminate that power. As a result, there will be a diminution of the stature and integrity of the local court system as well as a strain on the resources of the federal court system comparable to the one that contributed in 1970 to the decision of Congress to remove jurisdiction

over local offenses from the district court. The issue we present is, we submit, thus so fundamental to the allocation of judicial powers in the District of Columbia that review by this Court is essential.

Prior to court reorganization, the United States District Court for the District of Columbia had jurisdiction over local felony prosecutions under the District of Columbia Code; appeals from convictions were to the United States Court of Appeals for the District of Columbia Circuit, with that court ultimately developing the criminal jurisprudence for the District of Columbia. A principal accomplishment of the District of Columbia Court Reform and Criminal Procedure Act of 1970 was to change that situation by removing jurisdiction over local criminal offenses from the federal district court and the federal appellate court and reposing it in the local court system. The thrust of court reorganization was to assure that the United States District Court and the United States Court of Appeals, unable to cope with their burgeoning caseloads, would no longer be burdened with business of a purely local nature. See *Palmore* v. *United States*, *supra*, 411 U.S. at 408-409; S. Rep. No. 91-405, 91st Cong., 1st Sess., pp. 1-3, 5 (1969); H.R. Rep. No. 91-907, 91st Cong., 2d Sess., pp. 23-25, 33-35 (1970). At the same time, the legislation substantially expanded and upgraded the local court system.

In the Court Reform Act, Congress expressly designated the District of Columbia Court of Appeals as "the highest court of the District of Columbia"

(11 D.C. Code 102), and it intended that court to function as the final arbiter of claims in the local court system, with review available only by a writ of certiorari or appeal to this Court. The decisions in these cases frustrate the congressional intent by again placing any three-judge panel of the United States Court of Appeals, or even a single United States District Judge, in a position to overturn decisions of the District of Columbia Court of Appeals.

Moreover, once it is clear that the mere allegation in the Superior Court of a constitutional violation will automatically open the door to the federal courthouse, it will surely become commonplace for persons convicted after trial in the Superior Court to seek habeas corpus in the United States District Court, thereby adding another resource-consuming layer of litigation between the institution of a criminal case and its final determination.[10] The purpose

[10] The United States Attorney for the District of Columbia has informed us that in the eleven months from January 1, 1975, to November 30, 1975, there were approximately 1036 convictions after trial in the Superior Court (approximately 600 misdemeanors and 436 felonies). The Clerk of the District of Columbia Court of Appeals has advised us that during the same period of time that court decided 346 appeals in criminal cases from the Superior Court. His review of the records indicates that appellants in 251 of those cases raised federal constitutional issues. 120 were appeals by defendants, 125 were appeals by the United States (78 of which involved the constitutionality of a single statute), and six were appeals by the District of Columbia. If federal habeas corpus routinely becomes the next step in the process of review—as surely it will under the decisions in the instant cases—a large number of cases can thus be expected to find their way by means of

of the Court Reform Act was precisely to avoid that result. Cf. *Palmore* v. *United States*, *supra*, 411 U.S. at 408-409.[11]

habeas corpus to the United States District Court and ultimately to the United States Court of Appeals.

The frequency of resort to federal habeas corpus will, moreover, be increased in no small part by the frequency of disagreement between the two court systems on such issues as search and seizure or the standards for assessing effectiveness of counsel. Compare, *e.g.*, *United States* v. *Robinson*, 471 F.2d 1082 (C.A.D.C.), reversed, 414 U.S. 218, with *United States* v. *Simmons*, 302 A.2d 728 (D.C. App.) (search and seizure); *United States* v. *DeCoster*, 487 F.2d 1197 (C.A. D.C.), with *Herbert* v. *United States*, 340 A.2d 802, 804 (D.C. App.), and *Angarano* v. *United States*, 312 A.2d 295, 298-299, petition for rehearing denied, 329 A.2d 453 (D.C. App.) (ineffective assistance of counsel).

[11] Indeed, the decisions in these cases may have nationwide implications, because persons convicted and sentenced in the Superior Court of the District of Columbia and committed to the custody of the Attorney General are usually confined at correctional facilities outside the District of Columbia. Under the decisions in the present cases, however, those prisoners, after exhausting their Superior Court remedies under Section 110, would seemingly be free to file federal habeas corpus petitions in the district where they are confined. Thus, Superior Court convictions may well be subject to attack all over the country in courts applying differing interpretations of the Constitution as it affects the District of Columbia Code. The potential practical impact of this result is significant; we have been advised by the United States Bureau of Prisons that, as of October 28, 1975, a total of 2,678 persons who have been convicted of violations of the District of Columbia Code are incarcerated in institutions outside the District of Columbia (2,060 of them at Lorton Reformatory, in the Eastern District of Virginia), while only 651 such persons are incarcerated within the District of Columbia. Thus, the holdings of the court below will produce the precise effect that Section

2. The construction placed on 23 D.C. Code 110 by the court of appeals in these cases so far departs from established principles of statutory construction, and so clearly disregards the meaning previously given by this Court to identical statutory language, as to warrant review by this Court.

23 D.C. Code 110 by its terms grants to the Superior Court the general power to entertain collateral attacks upon its own convictions (23 D.C. Code 110 (a)); it provides for appeal only to the District of Columbia Court of Appeals (23 D.C. Code 110(f)), with ultimate review available in this Court. Subsection (g) explicitly prohibits any other court, including the United States District Courts, from entertaining attacks on Superior Court convictions if the applicant has failed first to seek relief in the Superior Court under Section 110 *or* if he has sought relief from the Superior Court and relief has been

---

2255 (the model for 23 D.C. Code 110) was designed to prevent—that effect being to permit the court for the district where the prisoner is confined to second-guess the sentencing court and the appellate court to which it is responsible.

Moreover, there is some question whether the federal district court in the District of Columbia would have jurisdiction over the custodian of an institution outside the District—here, whether the court had jurisdiction in *Pressley* over Superintendent Swain, the warden of Lorton Reformatory. The court of appeals has held that the Superintendent of Lorton is, for some purposes, a federal official "within the District of Columbia" and therefore may be sued in the United States District Court for the District of Columbia. *McCall* v. *Swain*, 510 F.2d 167 (C.A.D.C.). In any event, however, the question of which federal district court (if any) has jurisdiction over Superintendent Swain was not directly contested in the courts below.

denied. These two categories appear to include the entire universe of persons convicted in the Superior Court; they certainly encompass the respondents herein. The only exception to this prohibition is where the remedy by motion to the Superior Court is "inadequate or ineffective to test the legality of [a prisoner's] detention" (23 D.C. Code 110(g)). Apart from respondents' constitutional objections to the status of the Superior Court, there is no suggestion that that court fails to provide an adequate and effective forum to adjudicate respondents' collateral attacks on their convictions.[12]

Despite this clear congressional directive that a petition for habeas corpus "shall not be entertained" once the Superior Court has denied relief, the court of appeals concluded that Congress did not intend by Section 110(g) to "affect the [federal] district courts' jurisdiction to entertain post-conviction habeas petitions from local prisoners" but merely intended to create "an exhaustion of remedies statute, requiring initial submission of claims to the local courts" (App. A, *infra*, p. 45a).

---

[12] A statutory collateral attack remedy is not "inadequate or ineffective" merely because the sentencing court has refused relief or because the decisional law in the court in which the defendant was convicted and sentenced is less favorable to him than that in the court in which habeas corpus would lie. The remedy is "inadequate or ineffective" only if it can be shown that some limitation on scope or procedure prevented the collateral attack proceeding from providing a full hearing and adjudication. See, *e.g.*, *Application of Galante*, 437 F.2d 1164, 1165 (C.A. 3); *Accardi* v. *Blackwell*, 412 F.2d 911, 913-914 (C.A. 5); *Cain* v. *Markley*, 347 F.2d 408, 410 (C.A. 7).

The decision of the court of appeals flouts the unambiguous language of the statute. If Section 110 (g) is read, as it must be under established principles of statutory construction,[13] in an effort to give each part of the provision its intended meaning, it is apparent that the Section cannot be what the court of appeals held it to be, a mere exhaustion of remedies provision. While one clause ("shall not be entertained * * * if it appears that the applicant has failed to make a motion for relief under this section") properly may be interpreted as precluding relief in the federal district courts (and other courts) absent the exhaustion of remedies in the local Superior Court, the second independent clause ("shall not be entertained * * * if it appears * * * that the Superior Court has denied him relief") clearly denies the United States District Courts jurisdiction to award post-conviction relief to prisoners convicted in the Superior Court who have exhausted their remedies in the Superior Court. In short, relief is available in the district court under the statute only when the remedy by motion to the Superior Court is "inadequate or ineffective." There has been no claim of such inadequacy or ineffectiveness here.

Moreover, 23 D.C. Code 110 was modeled on 28 U.S.C. 2255, "with only the necessary technical changes," and was intended to operate in an identical manner. S. Rep. No. 91-405, *supra*, at p. 38; H.R.

[13] See *Caminetti* v. *United States*, 242 U.S. 470, 485-486; 2A Sutherland, *Statutes and Statutory Construction*, §§ 46.01, 46.06 (4th ed. 1973).

Rep. No. 91-907, *supra*, at p. 117. It is established that the purpose of Section 2255 was to provide in the sentencing court a statutory substitute for traditional habeas corpus "exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined." *Hill* v. *United States*, 368 U.S. 424, 427. See also *Sanders* v. *United States*, 373 U.S. 1, 13-15; *United States* v. *Morgan*, 346 U.S. 502, 511; *United States* v. *Hayman*, 342 U.S. 205, 219; 2 Wright, *Federal Practice and Procedure* 579, 589 (1969).

There is not the slightest suggestion in any of this Court's opinions that the language of Section 2255, identical to that of 23 D.C. Code 110(g), is merely an exhaustion of remedies provision, entitling a prisoner to seek habeas corpus in another court after having been unsuccessful in the collateral attack proceeding in the sentencing court. See 2 Wright, *Federal Practice and Procedure*, *supra*, at 584-585. Rather, the opinions of this Court cited above make clear that Section 2255 provides a substitute remedy in the sentencing court, with no other court being permitted to entertain an application for habeas corpus if the sentencing court has considered the application for relief and denied it.[14] It is not justifiable to give the identical language in these two closely related statutes contradictory meanings.

[14] One commentator, who served as counsel to the Senate District Committee when it reported out the Court Reform Act, has stated: "[T]he Court Reorganization Act extinguishes the traditional authority of the federal courts to re-

3. Apart from the difficulty of squaring the result reached by the court of appeals with the language of the statute itself, the decisions in these cases raise other fundamental questions regarding their methodology of statutory construction that warrant review by this Court.

The first involves the novel proposition that it is proper to disregard a plain and seemingly unambiguous statutory directive on the basis of the conclusion that the legislative history does not affirmatively disclose that Congress meant what it said, when that history equally fails to demonstrate that Congress meant anything else. This approach by the court of appeals is a radical new departure in the field of statutory interpretation.

The second technique, although seemingly less unconventional, is even more deserving of the attention of this Court. The court of appeals justified its "construction" of the statute as being undertaken in order "to avoid difficult constitutional questions" (App. A, *infra*, pp. 5a, 45a). While we do not question the propriety of the related but materially different precept that statutes are, whenever possible, to be construed to avoid unconstitutionality, it by no means follows that it is proper to reject the result intended

---

view local judicial action by the issuance of writs of habeas corpus." Williams, *District of Columbia Court Reorganization, 1970*, 59 Geo. L. J. 477, 499 (1971). See also Rauh and Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970*, 20 Am. U. L. Rev. 252, 339-340 (1970).

by the legislature simply in order to avoid considering the possible constitutional difficulties with such a result.[15] That is particularly so where, as here, it is necessary to read an entire phrase out of the statute in order to avoid considering the constitutionality of that phrase.

What has actually happened in this case, we respectfully submit, was not at bottom statutory construction. Nowhere does the court explain what meaning is to be attached to the words of Section 110(g) to authorize the result reached. Rather, the last clause of that Section has been, in effect, declared unconstitutional—this result being justified by the desire to avoid deciding the constitutional issues presented.

4. The constitutional objections leveled against the statutory preclusion of habeas corpus jurisdiction in a federal district court are principally two: that, by remitting persons convicted in the Superior Court of the District of Columbia solely to collateral

---

[15] As Justice Frankfurter admonished:

> The Court-devised precept against avoidable conflict with Congress through unnecessary constitutional adjudication is not a requirement to distort an enactment in order to escape such adjudication. Respect for the doctrine demands and only permits * * * extract[ing] an interpretation which shies off constitutional controversy, *provided* such interpretation is consonant with a fair reading of a statute.

International Association of Machinists v. *Street*, 367 U.S. 740, 799-800 (Frankfurter, J., dissenting). See also Friendly, *Benchmarks* 210-212 (1967).

remedies provided in that court, Congress has to that extent impermissibly suspended the availability of the writ of habeas corpus, in violation of Article I, Section 9, Clause 2; and that the restriction also violates equal protection principles embodied in the Due Process Clause of the Fifth Amendment by depriving District of Columbia defendants of access to a federal district court that is available to persons convicted in state courts or, perhaps, in federal district court.

We see no purpose to be served at this point in discussing the merits of these contentions at any length. Whatever else may be said, the unconstitutionality of Section 110 on either of these grounds is far from plain; on the contrary, as Judge Robb indicated in his dissent, this Court's earlier *Palmore* decision suggests that respondents have a hard row to hoe in this regard. Surely, if the congressional purpose to exclude the federal district courts from the administration of local criminal law in the District of Columbia is to be overriden on either of these constitutional grounds, it should be done by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writs of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

ANDREW L. FREY,
Deputy Solicitor General.

PAUL L. FRIEDMAN,
Assistant to the Solicitor General.

JEROME M. FEIT,
JOSEPH S. DAVIES, JR.,
Attorneys.

DECEMBER 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 74-1832

ROOSEVELT F. PALMORE, APPELLANT

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA ET AL.

Argued April 24, 1975

Decided July 9, 1975

Appeal from the United States District Court
for the District of Columbia
(D.C. Habeas Corpus 31-73)

Frank F. Flegal, Washington, D. C., for appellant in No. 74-1832.

Albert H. Turkus, Asst. U. S. Atty., with whom Earl J. Silbert, U. S. Atty., John A. Terry, Warren R. King, Craig M. Bradley, and Tobey W. Kaczensky, Asst. U. S. Attys., were on the brief for appellees.

Before BAZELON, Chief Judge, and WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON, MacKINNON, ROBB and WILKEY, Circuit Judges, sitting en banc.

Opinion for the Court filed by Circuit Judge TAMM.

Dissenting opinion filed by Circuit Judge ROBB.

TAMM, Circuit Judge:

This case and its companion, Pressley v. Swain, No. 73-1975, also decided today, present the important question whether Congress, by enacting 23 D.C. Code § 110(g) (1973), as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, eliminated the jurisdiction of the United States District Court for the District of Columbia to entertain post-conviction petitions for writs of habeas corpus brought by individuals convicted in the Superior Court. Answering that question negatively, we reverse the district court's dismissal of such a petition for lack of jurisdiction and remand for consideration on the merits.

I

On February 23, 1971, appellant Palmore was indicted in the Superior Court of the District of Columbia for carrying a pistol without a license in violation of 22 D.C.Code § 3204 (1973). Prior to trial, he unsuccessfully moved to suppress evidence on fourth amendment grounds, and thereafter, was convicted in a non-jury trial and sentenced. A. 12-44.[1] Palmore appealed to the District of Columbia Court of Appeals which, passing fully upon his fourth amendment claim, affirmed his conviction. Palmore

[1] Appellant was sentenced to two to six years imprisonment. Except for six months, execution of the sentence was suspended, and Palmore was placed on probation for six years. A. 45.

v. United States, 290 A.2d 573, 580-84 (D.C.Ct.App. 1972). On further review the Supreme Court affirmed his conviction without considering Palmore's fourth amendment claim. Palmore v. United States, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973).[2]

Before the Supreme Court's mandate had issued, Palmore petitioned for a writ of habeas corpus in the United States District Court for the District of Columbia, alleging that he was being held in custody in violation of the fourth amendment. On July 10, 1974, the district court dismissed his petition on the ground that "Congress has deprived this Court of jurisdiction by providing in 23 D.C.Code § 110(a) that post-conviction collateral attack upon convictions in the Superior Court of the District of Columbia may be made by motion in that court. . . ."[3] This appeal followed.

[2] The Supreme Court postponed the question of its jurisdiction until consideration of the merits. The Court eventually decided that review from the District of Columbia Court of Appeals would be by certiorari rather than appeal, and then granted certiorari limited to the question of whether appellant could constitutionally be tried for a congressionally-enacted criminal offense in other than an article III court. Palmore v. United States, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973).

[3] A. 8. The court further noted that § 110 authorized appellant to apply for relief in Superior Court, and he had not done so nor had he demonstrated why that remedy was "inadequate and ineffective". A. 9.

Palmore had been freed on bail pending direct review of his conviction. The district judge first continued bail pending his disposition of Palmore's petition and has now continued bail pending this appeal. A. 7, 11.

Appellant makes two arguments in support of jurisdiction—one statutory, the other constitutional.[4] First, he argues that 23 D.C.Code § 110(g) should not be construed to deprive the district court of its traditional habeas corpus jurisdiction because Congress itself never intended such a result. Second, he contends that if section 110(g) divests the district court of its jurisdiction, the statute is unconstitutional because it: (1) constitutes a suspension of the writ of habeas corpus contrary to article I, section 9, clause 2 of the Constitution[5] and (2), denies him the equal protection of the laws inherent in the due process clause of the fifth amendment.

The Government, in opposition to each contention advanced by appellant, initially argues that the statute is clear on its face, and the only possible construction of it precludes post-conviction relief in the United States District Court for the District of Columbia for an individual convicted in Superior Court. Further, the Government contends that section 110(g), so construed, is a proper exercise of Congress' power to define and limit the jurisdiction of federal courts, is not a suspension of the writ of habeas

---

[4] As mentioned *supra*, the identical issue was raised and analogous arguments advanced in Pressley v. Swain, No. 73-1975, which was argued before this court the same day as the instant case. Arguments made in *Pressley* have been given the fullest consideration in the preparation of this opinion.

[5] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

corpus, and does not create an irrational classification in violation of the equal protection guarantee of the due process clause.

[1] As discussed in detail below, we conclude that section 110(g) does not so restrict the jurisdiction of the district court, but is merely an exhaustion of remedies requirement. Acceptance of the Government's construction would result in significant changes in habeas corpus jurisdiction traditionally exercised by the federal courts, and force us directly to confront serious and significant constitutional questions; the Government would have us take this route into previously uncharted constitutional waters without a scintilla of Congressional intent to endorse it. Instead, we conclude that Congress never intended to affect the federal courts' habeas jurisdiction by enacting section 110(g). In so doing, we reaffirm the concept that statutes should be interpreted to avoid difficult constitutional questions, questions which necessitate in this case inquiry beyond the face of the statute to its legislative history. This inquiry leads us to a result consistent with that legislative history and the primary purposes behind the Court Reform Act itself.

II

In 1970, Congress passed the District of Columbia Court Reform and Criminal Procedure Act, Pub.L. No. 91-358, 84 Stat. 473 (Court Reform Act) resulting in a fundamental reorganization of judicial administration in this jurisdiction. See Palmore v.

United States, *supra*, 411 U.S. at 392 n.2, 93 S.Ct. 1670. Thereafter, courts have struggled to interpret the Act properly and to define the relationship between the court systems it created. *See, e.g.*, McCall v. Swain, 167 U.S.App.D.C. ——, 510 F.2d 167 (1975) (district court jurisdiction and interpretation of 16 D.C.Code § 1901 (1973)); Johnson v. Robinson, 166 U.S.App.D.C. ——, 509 F.2d 395 (1974) (interpreting pre-habeas exhaustion requirement of 24 D.C.Code § 301(k)(7)); M.A.P. v. Ryan, 285 A. 2d 310 (D.C.Ct.App. 1971) (stare decisis effect of federal decisions for local courts); *cf.* Luck v. Baltimore & Ohio Railroad Co., 166 U.S.App.D.C. ——, 510 F.2d 663, 665-66 (1975) (applicability of *Erie* doctrine to District). The instant case presents another such situation.[6]

23 D.C.Code § 110 (1973)[7] provides for post-conviction relief in the Superior Court of the District of Columbia. Subsection (g) reads:

---

[6] In Pernell v. Southall Realty, 416 U.S. 363, 368 n.4, 94 S.Ct. 1723, 1726, 40 L.Ed.2d 198 (1974), the Court acknowledged the apparently unresolved question of the district court's post-court reform habeas jurisdiction and recognized if section 110(g) stripped the district court of jurisdiction to entertain post-conviction petitions, that raised the issue of whether the Supreme Court "has a special obligation to resolve conflicts between the District's 'local' and 'federal' courts on questions of constitutional law raised in such petitions."

[7] § 23-110. Remedies on motion attacking sentence

(a) A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.

(b) A motion for such relief may be made at any time.

(c) Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. If the court finds that (1) the judgment was rendered without jurisdiction, (2) the sentence imposed was not authorized by law or is otherwise open to collateral attack, (3) there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner, resentence him, grant a new trial, or correct the sentence, as may appear appropriate.

(d) A court may entertain and determine the motion without requiring the production of the prisoner at the hearing.

(e) The court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

(f) An appeal may be taken to the District of Columbia Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(g) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State Court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply

> for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State Court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

The district court held that this section divested it of jurisdiction to entertain appellant's post-conviction petition for a writ of habeas corpus. A. 8-9.

A

Appellant asserts that the district court erred in this regard. Contrariwise, the Government repeatedly argues that the language of subsection (g) is "clear and unambiguous" and claims that "this Court would be denying the manifest intent of Congress if [we] were to construe the statute in any way other than to preclude post-conviction relief in the District Court for one convicted in the Superior Court." Gov't. Br. at 13. The Government concedes appellant's point that courts often construe statutes to avoid difficult constitutional questions,[8] but asserts that such an approach is inappropriate where the statute's meaning is clear. *See, e.g.*, Jay v. Boyd,

[8] Gov't Br. at 12; *see, e.g.*, United States v. Rumely, 345 U.S. 41, 45, 73 S.Ct. 543, 97 L.Ed. 770 (1953); Crowell v. Benson, 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598 (1932); The Japanese Immigrant Case, 189 U.S. 86, 101, 23 S.Ct. 611, 47 L.Ed.2d 721 (1903).

351 U.S. 345, 357 n.21, 76 S.Ct. 919, 100 L.Ed. 1242 (1956); United States v. Thompson, 147 U.S.App. D.C. 1, 452 F.2d 1333; 1341 (1971), cert. denied, 405 U.S. 998, 92 S.Ct. 1251, 31 L.Ed.2d 467 (1972) (if Congress clearly intended unconstitutional result, court's responsibility is to invalidate the law).

As to the proper methodology to apply when a statute is facially clear and unambiguous, the Government advances the rule of Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917) (citations omitted):

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.
>
> Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.

The Government contends that appellant's argument that the district court's interpretation of the statute receives no support in its legislative history[9] flies in the face of established principles of statutory construction:

> Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken

[9] See notes 32-39 *infra* accompanying and text.

> into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed.

Gov't. Br. at 22-23, *quoting* United States v. Missouri Pacific R.R. Co., 278 U.S. 269, 278, 49 S.Ct. 133, 73 L.Ed. 322 (1929) (citations omitted).

[2, 3] However, recognizing that statutory construction is, at best, an imperfect science, *see* Schiaffo v. Helstoski, 492 F.2d 413 (3rd Cir. 1974), the Supreme Court has cautioned that "[g]eneralities about statutory construction help us little. *They are not rules of law but merely axioms of experience.* They do not solve the special difficulties in constructing a particular statute. The variables render every problem of statutory construction unique." United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221, 73 S.Ct. 227, 229, 97 L.Ed. 260 (1952) (emphasis added, citations omitted). The variables in this case include the recognition that section 110 (g), passed in an Act creating an independent local court system,[10] may have a significant impact on the

[10] The Superior Court of the District of Columbia is clearly a court created under Congress' article I legislative powers. Palmore v. United States, *supra*, 411 U.S. at 398-99, 93 S.Ct. 1670.

traditional jurisdiction of certain article III courts. Indeed, the district court determined that the statute divested it of jurisdiction to entertain appellant's application for a writ of habeas corpus, a construction which implies that Congress has eliminated jurisdiction, presently contained in 28 U.S.C. §§ 2241 *et seq.* (1970), which the inferior article III courts have passed since the passage of the Judiciary Act of 1789.[11] Section 110(g) would thereby represent a fundamental change in the administration in the District of Columbia of the Great Writ, "the most celebrated writ in the English Law," [12] the effectiveness of which is protected by the Constitution itself. Further, even under this interpretation, Congress has only *partially* divested the district court of its traditional habeas jurisdiction. The bar of section 110(g) only extends to post-conviction collateral attacks; the district court may entertain petitions for writs of individuals who stand accused of "local crimes" [13] and wish to test the legality of their detention.[14]

[11] *See* Judiciary Act of 1789 § 14, 1 Stat. 73, 81-82 (1789).

[12] 3 Blackstone's Commentaries 129.

[13] The term in this context refers to congressionally enacted criminal statutes applicable only to the District of Columbia and codified in the District of Columbia Code.

[14] Of course, the courts in their discretion may decline to exercise their jurisdiction. As yet unresolved is the applicability of the *Younger* line of cases to the relationship of the District's two court systems, especially if there is no post-conviction collateral attack available in the article III courts.

[4, 5] Under the Government's clear meaning construction, the inferior article III courts would not be the only courts affected, since the operative language of section 110(g) bars entertainment of petitions for writs of habeas corpus by "*any* Federal or State Court", ostensibly including the Supreme Court of the United States. *See* 11 D.C.Code § 101(1)(A) (1973). This reading of section 110(g) would divest the Supreme Court of jurisdiction to entertain motions for "original" writs of habeas corpus [15] in situations like the one at bar, overturning nearly two hundred years of practice.[16] Granted this "original" writ has lost much of its practical utility,[17] nonetheless its availability has been utilized, especially by *pro se* prisoners' petitions.[18]

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *see* Pernell v. Southall Realty, *supra*, 416 U.S. at 368 n.4, 94 S.Ct. 1723.

[15] *See* 28 U.S.C. § 2241(a), (b) (1970). This "original" writ of habeas corpus is part of the Supreme Court's appellate jurisdiction, *see* Ex. parte Bollman, 8 U.S. (4 Cranch) 75, 94-95, 2 L.Ed. 554 (1807), which under article III is subject to exceptions that Congress may provide. *See generally*, Oaks, The "Original" Writ of Habeas Corpus in the Supreme Court, 1962 Sup.Ct.Rev. 153. It is clear that the Supreme Court, aside from section 110(g), would have appellate jurisdiction to issue the writ on behalf of one convicted in Superior Court. *See* Palmore v. United States, *supra*; United States v. Coe, 155 U.S. 76, 86, 15 S.Ct. 16, 39 L.Ed. 76 (1894); Oaks, *supra*, at 166-67.

[16] The Supreme Court has protected its habeas jurisdiction and has construed Congressional attempts to eliminate it narrowly. For example, in the famous case of Ex parte McCardle, the Court upheld a statute withdrawing the 1867 grant of appellate jurisdiction in habeas corpus cases. 74 U.S. (7 Wall.) 506, 19 L.Ed. 264 (1868). Less than a year later, the Court held that the repeal did not affect its original habeas jurisdiction under the 1789 Judiciary Act. Ex parte Yerger, 75 U.S. (8 Wall.) 85, 19 L.Ed. 332 (1868). Thus, the Court retained power to review cases like McCardle's through original writs of habeas corpus and certiorari.

[17] In the Nineteenth Century, the Court used the writ expansively in aid of its jurisdiction. *See, e.g.*, Ex parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873); Ex parte Yerger, *supra*. The return of appellate jurisdiction in 1885 and the 1891 grant of review of federal criminal convictions reduced the use of the writ. *See* Oakes, *supra* note 17, at 181-82. The development of both the statuotry and common-law writs of certiorari has now made the original writ an "anachronism". *Id.* at 182-189, 206.

In this century, the Court apparently has granted an original writ only three times. Hart & Wechsler's The Federal Courts and The Federal System 1431 (2d ed. 1973); *see* Ex parte Grossman, 267 U.S. 87, 45 S.Ct. 332, 69 L.Ed. 527 (1925); Ex parte Hudgings, 249 U.S. 378, 39 S.Ct. 337, 63 L.Ed. 656 (1919); Matter of Heff, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848 (1905). Nevertheless, motions for leave to file original writs of habeas corpus still are filed, especially by prisoners, and its continued existence may be symbolic of the Supreme Court's role as the ultimate dispenser of justice in the federal system; between 1929 and 1961, 2,000 such motions were filed. Oaks, *supra* note 15, at 209-11. During the late 1950's and 1960's, the Court began treating the motion as a writ of certiorari. *Id.* at 201-06; *see, e.g.*, Carnley v. Cochran, 366 U.S. 958, 81 S.Ct. 1927, 6 L.Ed.2d 1253 (1961); Cheeks v. Maryland, 355 U.S. 929, 78 S.Ct. 415, 2 L.Ed.2d 413 (1958). The present Court apparently treats the motions as miscellaneous orders and denies them explicitly as motions for leave to file petitions for writs of habeas corpus. *See* note 18 *infra*.

[18] *See, e.g.*, Schwartz v. Nevada, 417 U.S. 906, 94 S.Ct. 2634, 41 L.Ed.2d 229 (1974); Black v. Attorney General, 416 U.S. 980, 94 S.Ct. 2413, 40 L.Ed.2d 776 (1974).

The exercise of original habeas corpus jurisdiction is ex-

Not surprisingly, a statute with such significant jurisdictional effects raises difficult constitutional questions. These constitutional issues—whether section 110(g) constitutes an improper suspension of the Great Writ and whether by singling out those convicted of local District of Columbia crimes for eliminating access to the article III courts Congress has violated the concept of equal protection of law—form the backdrop for our consideration of Congress' intent in enacting section 110(g). While we need not resolve these difficult questions now, a brief overview of these unique and perplexing problems is important to an understanding of our approach to construing the statute.

B

1. *The Suspension Clause*

Appellant's constitutional argument concerning the suspension clause, article 1, section 9, clause 2, is that it acts as a restraint upon Congress' control over the jurisdiction of the inferior article III courts, and that once Congress created those courts and vested them with habeas jurisdiction, it may only substitute a remedy "exactly commensurate" with the Great Writ. Section 110, appellant reasons, is

---

tremely discretionary. *See, e.g.*, Ex parte Abernathy, 320 U.S. 219, 64 S.Ct. 13, 88 L.Ed. 3 (1943). 28 U.S.C. § 2241(b) empowers the Court to transfer the application to a district court with jurisdiction. The practice for the writ is governed by Supreme Court Rules 30 and 31.

not a commensurate remedy, and thus an unconstitutional suspension because the article III salary and tenure protections were not extended to Superior Court judges. To resolve these contentions would require us to pass directly upon fundamental and extremely prickly questions concerning the nature of the judicial system.

[6] Habeas corpus holds a unique position in our constitutional scheme. It is nowhere directly constitutionally endowed, but the Constitution, through the suspension clause, protects against its interference.

[7] This must be contrasted with Congress' authority to control the jurisdiction of the inferior article III courts. *See, e.g.*, Palmore v. United States, *supra*, 411 U.S. at 400-02, 93 S.Ct. 1670; Cary v. Curtis, 44 U.S. (3 How. 236, 244-45, 11 L.Ed. 576 (1845). Thus, Chief Justice Marshall could note on the one hand in Ex parte Bollman, S. U.S. (4 Cranch) 75, 93, 2 L.Ed. 554 (1807), "the power to award the writ by any of the courts of the United States, must be given by written law," and on the other state:

> It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it." Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; *for*

> *if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.* Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus.

Id. at 95, 2 L.Ed. 554 (emphasis added). Hence, while it seems well-established that Congress, despite the suspension clause, possesses *some* control over habeas jurisdiction, *see, e.g.*, Craig v. Hecht, 263 U.S. 255, 271-73, 44 S.Ct. 103, 68 L.Ed. 293 (1923); Whitney v. Dick, 202 U.S. 132, 137, 26 S.Ct. 584, 50 L.Ed. 963 (1906), the question of whether Congress would violate the suspension clause by failing to grant power to issue the writ at all has been avoided.[19]

---

[19] Appellant adopts, without real objection by the Government, a variant of this point as the premise to his suspension argument—the suspension clause requires Congress to empower at least one federal court to grant the writ. For example, absent the inferior federal courts, this view would dictate that the Supreme Court be empowered to grant the writ. *See, e.g.*, Appellant's Br. at 40-45; Reply Br. at 28-32.

Another question is whether the suspension clause, coupled with the fact that the Supreme Court is explicitly established by the Constitution, dictates a conclusion that Congress must endow the Court with some sort of habeas corpus or, despite the suggestion in *Bollman*, that the Court possesses nonstatutory authority to issue the writ. *See* Appellant's Br. at 42 n.34; Respondent's Memorandum of Law at 10 n.8 ("Jurisdiction of federal courts (*except the Supreme Court*) to issue writs of habeas corpus is surely statutory"). Thus, the plain meaning interpretation of the statute divesting the Supreme Court for the first time in our history of some of its "original" habeas jurisdiction would force us to enter into treacherous constitutional territory indeed.

This brings us to the crux of appellant's suspension clause argument—once the privilege to issue the writ in the inferior article III courts has been granted, Congress may not, consistent with the suspension clause, dilute or remove it. Appellant's Br. at 42; *see* Respondent's Br. at 29, United States v. Hayman, 342 U.S. 205, 72 S.Ct. 263, 96 L.Ed. 232 (1952) (Professor Freund). While conceding that the Supreme Court has not specifically endorsed this view, *see* Fay v. Noia, 372 U.S. 391, 406 n.15, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); United States v. Hayman, *supra*, 342 U.S. at 223, 72 S.Ct. 263, appellant contends that the Court has tacitly accepted it by requiring and then interpreting any attempted substitute to be "exactly commensurate" with the Great Writ.

The primary example is the Court's treatment of 28 U.S.C. § 2255 (1970), enacted in 1948 as a substitute for habeas corpus, and the statute upon which section 110 is based.[20] The Ninth Circuit held section 2255 to be an unconstitutional suspension of the writ. Hayman v. United States, 187 F.2d 456 (9th Cir. 1950). The Supreme Court disagreed and reversed because section 2255 was "intended to be as broad as habeas corpus" and simply "[afford] the same rights in another and more convenient forum." United States v. Hayman, *supra*, 342 U.S.

---

[20] S.Rep. No. 91-405, 91st Cong., 1st Sess. 38 (1969); H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 117 (1970); *see* part C *infra*.

at 217, 219, 72 S.Ct. at 271.[21] In subsequent cases the Court expanded upon this interpretation. In Sanders v. United States, 373 U.S. 1, 11-12, 83 S.Ct. 1068, 1076, 10 L.Ed.2d 148 (1963) (citations omitted), the Court, interpreting the successive petition bar of 28 U.S.C. § 2244 and § 2255, noted that "if construed to derogate from the traditional liberality of the writ of habeas corpus, § 2244 might raise serious constitutional questions", and that section 2255 was intended to provide "a remedy exactly commensurate with that which had previously been available by habeas corpus. . . ." *Id.* at 14, 83 S.Ct. at 1076, *quoting* Hill v. United States, 368 U.S. 424, 427, 82 S.Ct. 468, 7 Ed.2d 417 (1962).

Palmore concludes that section 110 is not exactly commensurate to habeas corpus both because it is inadequate to protect the interests which mandate ultimate article III review of questions involving constitutional liberty and because it entrusts that task to judges who do not possess the tenure and salary protections which lie at the heart of the independence of the federal judiciary. Appellant opines that in our constitutional system ultimate protection of our constitutional liberties is entrusted to article III judges. Habeas jurisdiction in the inferior federal courts discharges that function and also serves to produce uniform constitutional interpretation be-

[21] The Court has subsequently stated that in *Hayman* it had "avoided the constitutional question by holding that § 2255 was as broad as habeas corpus." Sanders v. United States, 373 U.S. 1, 13, 83 S.Ct. 1068, 1076, 10 L.Ed.2d 148 (1963).

tween local and federal courts. Moreover, argues Palmore, article III judges were made the final arbiters of the Constitution because of their preferred position of detachment and freedom from local pressures and considerations, *see* Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), guaranteed by the article III salary and tenure provisions, which judges of the District of Columbia courts do not possess. Hence, section 110 is not an exactly commensurate remedy and represents an unconstitutional suspension of the writ.

The Government responds by emphasizing Congress' authority to control the jurisdiction of the federal courts and defends section 110 as a constitutional exercise of that congressional authority. It contests the assertion that Congress, once having vested the inferior article III courts with habeas jurisdiction, may not reduce it. Moreover, the Government contends that the principle to be derived from Brown v. Allen, *supra*, is a need for *federal* review of constitutional claims and that section 110, creating a remedy in what the Government repeatedly characterizes as a "*federal* court," meets that need; it rejects the suggestion that the *Brown* Court attached importance to the institutional protections accorded article III judges by referring to commentators who have judged that factor to be of only "limited" significance. Gov't Br. at 31, *incorporating* Gov't. Pressley Br. at 31; *see* Developments in the Law—Habeas Corpus, 83 Harv.L.Rev. 1038,

1060 (1970).[22] In addition, the Government asserts that *Palmore* mandates the rejection of appellant's argument concerning the importance of the tenure and salary provisions, emphasizing that Congress also took precautions to ensure the independence of the Superior Court judges. Gov't. Pressley Br. at 39 n.32, 41-43. Finally, the Government claims that the uniformity argument must be rejected since the Supreme Court stands ready by writ of certiorari to resolve potential conflicts between the two court systems.[23] *Id.* at 35-37.

[8] What emerges from these conflicting positions is the absence of a clear or simple resolution. We are not as confident as the Government of the controlling nature of the Supreme Court's *Palmore* decision. While the Court rejected the salary and tenure argument in upholding trial of District of Columbia Code offenses in Superior Court, it noted that "Palmore was no more disadvantaged and no more entitled to an Art. III judge than any other citizen of any of the 50 States who is tried for a strictly local

[22] The Government points out that while a forum for a "second and removed hearing" for a review of constitutional claims may well be necessary, it may be in the same court, referring to the section 2255 analogy. Gov't Pressley Br. at 34.

[23] The Government also asserts that even if we "should conclude that the Constitution requires review by an Article III court of a petitioner's constitutional claim raised on collateral attack, . . . the appellate review available in the Supreme Court on a writ of certiorari should satisfy such a requirement." *Id.* at 43.

crime," and explicitly stated "[w]e do not discount the importance attached to the tenure and salary provisions of Art. III. . . ." 411 U.S. at 410, 93 S.Ct. at 1682. Because of procedural and institutional limitations, reliance upon Supreme Court discretionary review as the sole protection of important interests may be both inadequate and impracticable. *See* Brown v. Allen, *supra*, 344 U.S. at 489-97, 73 S.Ct. 397; Freund, Symposium—Habeas Corpus, Proposals for Reform, 9 Utah L.Rev. 18, 27-28 (1964). Finally, while the Superior Court is undeniably a federal court in the sense it was *created* by Congress, it is not a federal court as *defined* by Congress in the Court Reform Act;[24] the significance, if any, of the distinction would have to be discerned.

However, adoption of appellant's argument would require recognition as constitutionally overriding of factors, the importance of which have only been hinted at previously. It would also demand delineating for the first time the boundaries of congressional control over federal jurisdiction *vis-a-vis* the suspension clause. Both parties recognize the unresolved nature of this question. Palmore concedes "the full meaning of the constitutional guarantee against the writ's suspension has never been fully explored," Appellant's Br. at 40; the Government "acknowledge[s] that this question is one of the first impression." Gov't Pressley

[24] The article III courts are defined as federal courts. The Superior Court and District of Columbia Court of Appeals are defined as District of Columbia courts. 11 D.C. Code § 101(1) (1973).

Br. at 30. In fact, one commentator has noted: "The suspension clause, so simple in appearance, is fraught with confusion. Those few cases which have dealt with it provide little interpretative guidance." Developments, *supra*, 83 Harv.L.Rev. at 1263.

This difficult question, along with the equal protection problem to which we now turn is a significant "variable" which compels us to reject the Government's "clear meaning" approach to the statute. *See* United States v. Universal C.I.T. Credit Corp., *supra*.

2. *Equal Protection*

Palmore's equal protection argument is straightforward. Since 28 U.S.C. §§ 2241 *et seq.* apply to every person in custody either by authority of the United States or in violation of the Constitution laws, or treaties of the United States, then, if the district court's interpretation of section 110(g) is upheld, the statute would deny prisoners convicted in the Superior Court equal protection as guaranteed by the due process clause of the fifth amendment. *See* Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). Appellant places significant reliance upon our decision in United States v. Thompson, *supra*, 452 F.2d at 1338-41, where we found that 23 D.C.Code § 1325, if construed to be applicable to individuals convicted of federal crimes in district court, would deny them equal protection by treating prisoners in the District differently than those in every other district court whose motions for release pending appeal would be judged under the more lenient standards

of the Bail Reform Act, 18 U.S.C. § 3148 (1970). *See also* United States v. Hairston, 161 U.S.App.D.C. 466, 495 F.2d 1046 (1974); United States v. Henson, 159 U.S.App.D.C. 32, 486 F.2d 1292 (1973) (en banc); United States v. Brown, 157 U.S.App.D.C. 311, 483 F.2d 1314 (1973).

In response, the Government again points to Congress' broad power to legislate for the District of Columbia under article I, section 8, clause 17 and to the unique position of the District in our federal system. It also challenges the "fundamentalness" of the right appellant advances—collateral review in an article III court. It notes that Congress may draw distinctions among citizens so long as there is sufficient justification for the distinction and argues that the justification "virtually cries out from the legislative history of the Court Reorganization Act," the criminal backlog in the district court and the " 'crisis' of crime 'gripping' the city." [25] Finally, the Government attempts to distinguish the *Thompson* case by three methods. First, it argues that unlike appellant, Thompson stood convicted of federal offenses; second, it disputes *Thompson's* premise that "Congress cannot constitutionally create standards of treatment to be applied in the District of Columbia which differ from those applicable elsewhere" because the premise "seriously undermines and restricts the traditional plenary power of Congress under the Con-

[25] *See* Gov't Pressley Br. at 46, *citing* H.R. Rep. No. 91-907, *supra* note 20, at 25-27, 226; S. Rep. No. 91-405, *supra* note 20, at 2-3.

stitution 'to exercise exclusive Legislation in all Cases whatsoever' for the District of Columbia;" [26] and finally, it argues this case differs from *Thompson* because adoption of "appellant's argument threatens to destroy the constitutionally mandated powers of the legislative branch to serve as a check and balance on the judicial branch by controlling the latter's jurisdiction." [27]

The difficulty with Palmore's argument is to ascertain exactly what right the classification affects and what interest the Government must advance to justify the distinction. We have recognized "[t]he rights of a criminal defendant are in some sense the most basic of all, since what is at stake is no less than the freedom to be free." United States v. Thompson, *supra*, 452 F.2d at 1340. However, the alleged right that appellant is attempting to protect may be precisely defined as the guarantee to have his claim heard

---

[26] Gov't Pressley Br. at 47-48. The Government further attempts to undercut the *Thompson* premise by asserting that it is in direct conflict with our previous decision in Sims v. Rives, 68 U.S.App.D.C. 24, 84 F.2d 871, cert. denied, 298 U.S. 682, 56 S.Ct. 960, 80 L.Ed. 1402 (1936), which held that equal protection as applied to the District of Columbia meant only that all persons within the District must be treated alike. However, the *Thompson* division distinguished and limited *Sims* to its facts, and hence that case can no longer be invoked for such a broad, general proposition. Moreover, assuming *arguendo* the validity of the principle the Government advances, there still exists a difficult equal protection problem concerning a classification of persons within the District. *See* notes 30-31 *infra* and accompanying text.

[27] Gov't Pressley Br. at 50.

in an article III court. As noted *supra*, the existence and extent of this right have never been fully delineated. Also unresolved is the question whether the Government must only demonstrate a rational basis for the classification, *see* Dandrige v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911), or if the right be deemed fundamental, a compelling interest. *See* Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); United States v. Thompson, *supra*.

[9] Despite these difficulties, we do not believe that appellant's argument can be disposed of as neatly as the Government purports. We are certainly aware of the *sui generis* position of the District of Columbia, *see, e.g.*, District of Columbia v. Carter, 409 U.S. 418, 432, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973), and of Congress' extensive power to legislate for the District [28] and to control the jurisdiction of the court systems it creates. However, Congress may not exercise its power, whether explicitly or implicitly derived from the Constitution, in a manner inconsistent with the limitations on government power contained elsewhere in that document. The *sui generis* nature

---

[28] It is apparent that the power of Congress under clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under art. I, § 8. Palmore v. United States, *supra*, 411 U.S. at 397-98, 93 S.Ct. 1670.

of the District and Congress' legislative authority are not talismans which make appellant's equal protection argument disappear. *See* United States v. Thompson, *supra*, 452 F.2d at 1338.

[10] Moreover, while the overriding legislative purpose of the Court Reform Act seems clear—the reorganization of the administration of criminal justice in the District to help alleviate "soaring" crime rates—it is not so clear that section 110(g) is a means sufficiently related to the achievement of that legislative end to be constitutional. If the court reforms were "calculated to restore the spectre of certain justice, [and] the deterrent impact of speedy disposition," [29] that interest may have been fully effectuated by the transfer of *trial* jurisdiction to the Superior Court. The relation to the identified interest of divesting the district court of its habeas jurisdiction appears more tenuous.

Even if we accept the classification of treating District prisoners differently as related to a legitimate legislative goal, there is a similar second classification involving prisoners *within* the District which poses equal protection problems. Section 110(g), under the Government's theory, only divests the district court of jurisdiction to hear post-conviction writs; pre-trial petitions remain unaffected. Clearly the legislative end of prompt criminal disposition cannot justify this

[29] Statement of the Managers on the Part of the Senate Submitted Regarding the Conference Action Upon S. 2601, the President's Crime Legislation for the District of Columbia, 91st Cong., 2d Sess. 2 (1970).

distinction.[30] Indeed, we are uncertain whether *any* rational justification could be advanced for this classification.[31]

Thus, what emerges from this discussion is that the district court's interpretation of section 110(g) raises serious questions about the statute's constitutionality. We have noted that "the presumption of the constitutional validity of legislation enacted by Congress raises a corollary presumption that constructions calling statutes into serious constitutional question are erroneous and, in any event, are to be avoided whenever possible." United States v. Hairston, *supra*, 495 F.2d at 1052; *see* note 8 *supra*. Of course, if Congress clearly intended the construction which raises these questions of first impression, they may not be avoided. *See* United States v. Thompson, *supra*. However, to ascertain that congressional intent, we cannot don the interpretive "blinders" the Government offers, but must construe the statute only after reference to the legislative history behind it and behind the entire Act. We now turn to that inquiry.

[30] This argument is *not* the equivalent of a potential claim brought by a federal post-conviction prisoner challenging 28 U.S.C. § 2255. The above complaint is not directed at venue or at the type of remedy available (since section 2255 has been held to be the equivalent of habeas corpus) but at the nature and characteristics of the forum available to hear the complaint.

[31] It is perhaps significant that at the time this legislation was enacted, the *Younger* v. *Harris* line of cases did not exist, and the controlling law was Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) and its progeny.

C.

The legislative history concerning section 110 is sparse. The Senate Committee Report stated:

> *Section 23-110* is new. Rather than relying on the inherent power of the superior court to review judgments of conviction, the new section provides statutory procedures for post-conviction challenges. Section 23-110 is modeled upon 28 U.S.C. section 2255 with only the necessary technical changes.

S.Rep.No.91-405, 91st Cong., 1st Sess. 38 (1969); *see* H.R.Rep.No.91-907, 91st Cong., 2d Sess. 117 (1970). Nowhere in the committee reports, nor in the congressional floor debates is there an explicit reference or even a suggestion that section 110 was to have the jurisdictional impact that the district court accorded it. In contrast, the existing brief legislative history indicates a different, but clear and logical legislative purpose behind section 110.

[11] Section 110 is "modeled upon 28 U.S.C. section 2255," which was enacted in 1948 for reasons that have been fully explored in previous court opinions, *e.g.*, Hill v. United States, supra, 368 U.S. at 427-28, 82 S.Ct. at 471-72; United States v. Hayman, *supra*, 342 U.S. at 210-224, 72 S.Ct. 263, and need only be summarized here. Before 1948 post-conviction petitioners for habeas corpus were normally filed in the district where the prisoner was confined, and hence the five districts where federal prisons were located received the bulk of these cases. 342 U.S. at 213-14 & n.18, 72 S.Ct. 263, *citing* Speck, Statistics

on Federal Habeas Corpus, 10 Ohio St.L.J. 337 (1949).[32] In response to this problem and after receiving the recommendation of the Judicial Conference of the United States, Congress eventually enacted 28 U.S.C. § 2255, authorizing a new remedy in the sentencing court "intended to be as broad as habeas corpus." *Id.* at 213-17, 72 S.Ct. at 271. The statute has been construed to be exactly commensurate with the Great Writ, and its principal effect has been to act as an equalizing venue provision for post-conviction pleas for collateral relief."[33]

In 1949, section 2255 was amended to apply to any "court established by Act of Congress," 63 Stat. 105 (1949), primarily to include within its scope the federal territorial courts. *See* United States ex rel. Leguillou v. Davis, 212 F.2d 681 (3rd Cir. 1954). However, while the local District of Columbia courts were generically courts created by "Act of Congress," the Municipal Court of Appeals held in Burke v. United States, 103 A.2d 347 (D.C.Mun.App. 1954) and Ingols

---

[32] The housekeeping problem was exacerbated by the fact that the records of the sentencing court, which could be a great aid in disposing of the petition, were not readily available to the habeas corpus court. United States v. Hayman, *supra*, 342 U.S. at 212-13, 72 S.Ct. 263.

[33] The Government disputes the characterization of the net effect of section 2255 as to be a venue provision. *See* Gov't. Br. at 17 n.14. Its argument appears undercut by the Supreme Court's constant reminder that section 2255 must be treated as *exactly commensurate* with the Great Writ. *See also* Kaufman v. United States, 394 U.S. 217, 221, 89 S.Ct. 1068, 1071, 22 L.Ed.2d 227 (1969) ("Section 2255 revised the procedure . . . but did not in any respect cut back the scope of the writ").

v. District of Columbia, 103 A.2d 879 (D.C.Mun. App. 1954) that they did not fall within the statute. Notably, *Burke* and *Ingols* did provide a collateral remedy by holding that the local courts had inherent common law power to entertain a motion to vacate a sentence. *Id.* at 880; 103 A.2d at 350-51.

[12] From this discussion and the fact that the Senate Report tracks the language of the *Burke* and *Ingols* opinions, the one explicit legislative intent behind section 110 becomes clear; rather than leaving the new local courts to rely once again upon their inherent authority, Congress provided a detailed statutory remedy. Quite naturally, as a model, Congress drew upon the statutory remedy previously created for the federal courts to alleviate a different problem.[34]

[13] In sum, the district court construed a statute which *created* a statutory remedy for post-conviction relief in the new court system as *eliminating* by implication a remedy which the inferior article III courts and the Supreme Court have exercised for two hundred years. Of course, repeals by implication, especially of jurisdictional statutes, are disfavored. *See, e.g.*, Lynch v. Household Finance Corp., 405 U.S. 538, 549, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972). As the Court recently stated, "this canon of construction

[34] The Superior Court does not have a problem of disproportionate allocation of petitions between courts such as the federal one which prompted section 2255.

As the Government has noted, Congress had before it extensive jurisprudence concerning section 2255 and thus knew it was using as a model an effectively "exactly commensurate" remedy.

applies with particular force when the asserted repealer would remove a remedy otherwise available." Schlesinger v. Councilman, —— U.S. ——, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975). Nevertheless, the Government argues the intent to repeal jurisdiction is evidenced by the "only necessary technical changes" language in the committee reports: "[t]he 'necessary technical changes' referred to in the legislative history were those changes 'necessary' to insure that a collateral attack on a conviction in the Superior Court could be entertained only in that court. . ." Gov't Br. at 24. That this argument is advanced by a party who is imploring us to adopt a plain meaning approach to the statute may strain credulity. We reject the assertion that the alleged jurisdictional effects can be described as merely technical changes, and conclude that no support for the district court's interpretation can be found in the legislative history behind section 110.[35]

[14] Several other indicia of congressional intent add credence to appellant's contention that Congress did not intend section 110(g) to affect the jurisdic-

[35] Our rejection of the Government's interpretation of this language is buttressed by the lack of debate over its effect and constitutionality. *See* notes 41-43 *infra* and accompanying text.

We also note that the commentators have split on the question before us. *Compare* Rauh & Silbert, Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970, 20 Am.U.L.Rev. 252 (1971) *and* Williams, District of Columbia Court Reorganization, 1970, 59 Geo.L.J. 477 (1971) *with* Smalls, Habeas Corpus in the District of Columbia, 24 Cath. U.L.Rev. 75 (1974).

tion of the article III courts. First, as part of the reorganization generated by the Court Reform Act, Congress amended title 28 of the United States Code to bring that title, Judiciary and Judicial Procedure, into conformity with the new court system. Congress added 28 U.S.C. § 292(c) to provide for temporary assignment of district court judges to serve as judges of the Superior Court; amended 28 U.S.C. § 1257 to include the District of Columbia Court of Appeals within the term "highest court of a State" for purposes of rules of review to the Supreme Court by appeal or certiorari; and amended 28 U.S.C. § 1869(b) to include the Superior Court within the scope of the term "district court" for purposes of parts of the Federal Jury Act.[36] In contrast, 28 U.S.C. § 2241 was not amended to reflect the partial divesture of jurisdiction allegedly enacted in section 110(g).[37] While certainly not dispositive,[38] we be-

[36] Section 172 also added 28 U.S.C. § 1451 to include the District of Columbia Courts within the provision for removal of cases from state courts and 28 U.S.C. § 1363 to exclude laws applicable exclusively to the District of Columbia from the chapter on district court jurisdiction and amended 28 U.S.C. § 2113 to include the District of Columbia Court of Appeals within the terms "state court", "State Courts", and "highest court of a State" for purposes of the chapter on procedural provisions concerning Supreme Court review.

[37] Such an amendment would not be unreasonable for as matters now rest, an alleged modification to jurisdiction codified in the United States Code is only codified in the District of Columbia Code.

[38] The Government offers two arguments which it contends undercuts the significance of this. First, the Government notes

lieve this is further evidence that Congress never intended to affect the federal courts' jurisdiction, especially in light of the evident care with which Congress legislated and the ease with which an express amendment could have been effectuated. *Cf.* Palmore v. United States, *supra*, 411 U.S. at 395, 93 S.Ct. 1670.

[15] Perhaps a more significant indicium is the obvious relationship between section 110 and a strong legislative purpose of the Court Reform Act, apparent from both the face of the Act and its legislative history—the establishment of a dual court system analogous to the relationship between the federal and state courts. This reorganization goal is abundantly clear in the legislative history. The Senate Committee Report states:

that when Congress enacted section 2255, it failed to amend the newly consolidated section 2241 to reflect the new remedy. Gov't Pressley Br. at 14-15. However, section 2255 was itself an amendment to and included in the habeas chapter of title 28.

Second, the Government asserts that when Congress amended 16 D.C.Code § 1901, it did not amend 28 U.S.C. § 2241 despite the fact "[t]here is no question that [section 1901] also acted to restrict the normal habeas corpus jurisdiction of the District Court." *Id.* at 15. Contrary to the Government's opinion, we have held that section 1901 does not affect the normal jurisdiction of the district court here. McCall v. Swain, 167 U.S.App.D.C. ——, 510 F.2d 167, 177 (1975).

In sum, we do not find that either of the Government's arguments undercut the point advanced above, which is conjunction with the other legislative history we discuss, dictate the result we reach.

> This transfer [of jurisdiction to the Superior Court] will bring the jurisdiction of the U.S. courts in the District of Columbia in line with the jurisdiction exercised by the Federal courts in the several States, and will give the local courts jurisdiction over all purely local matters.

S.Rep. No. 91-405, *supra*, at 5. The House Report similarly notes:

> Upon completion of the three stages of transfer of jurisdiction the United States District Court for the District of Columbia will be on a par with other United States district courts, exercising federal jurisdiction only, and the Superior Court of the District of Columbia will have all purely local jurisdiction.
>
> * * * * *
>
> The jurisdictional changes . . . will result in a Federal-State court system in the District of Columbia analogous to court systems in the several States.

H.R.Rep. No. 91-907, *supra*, at 34-35.

In cases dealing with the Court Reform Act and the District, the courts have recognized this legislative purpose. The Supreme Court has repeatedly invoked the federal-state analogy, *see* Pernell v. Southall Realty, *supra*, 416 U.S. at 367, 94 S.Ct. 1723; Palmore v. United States, *supra*, 411 U.S. at 408-09, 93 S.Ct. at 1681-82, and this court has noted that the "overriding purpose which emerges from the Act is to put the District's judicial system on a par with those of the states." United States v. Thompson, *supra*, 452 F.2d at 1342.

The interpretation of section 110 most harmonious with this federal-state analogy is clearly appellant's, which would allow the district court to entertain petitions for collateral review in the same manner as district courts do for the fifty states. In fact, it would not be inaccurate to state that the district court's holding is flatly inconsistent with this congressional purpose. Nowhere is there any indication that the federal-state analogy was subject to certain jurisdictional exceptions or that the district court here would possess less jurisdiction than in other districts.[39] In fact, 11 D.C.Code § 501 (1973) defines the civil jurisdiction of the district court, which includes habeas corpus, by initially stating that "[i]n addition to its jurisdiction as a United States district court." The only construction of section 110 consistent with this analogy is that Congress never intended to affect the district court's habeas jurisdiction.

---

[39] The Government argues that the legislative history reveals "that the United States District Court for the District of Columbia would no longer be burdened with so much business of a purely local nature, *not that the court would henceforth have precisely the same judisdiction.*" Gov't Br. at 29 (emphasis added). We must reject this latter suggestion because we believe it flies in the face of clear legislative history and consistent contrary court interpretations. In fact, we are surprised that the Government seriously advances it when it even quotes from the Senate Conference Managers:

> the Federal district court for the District of Columbia is to regain its rightful status as a Federal tribunal, devoted on a fulltime basis to Federal business, like all other United States district courts.

Statement, *supra* note 29, at 5.

To blunt this conclusion, the Government maintains that section 110(g) effectuates another, even more overriding, function of court reform, the elimination of jurisdiction over local matters in order to help alleviate the soaring District crime rate through swifter justice. In this regard, section 110 implements this purpose by "eliminat[ing] from the caseload of the District Court the large number of habeas corpus petitions that could potentially be brought by those convicted in the Superior Court and provid[ing] an alternative forum for the resolution of these claims." Gov't. Br. at 29. We disagree; these congressional purposes do not dictate the result the Government suggests, nor do we believe that to construe the statute as not affecting federal jurisdiction is inconsistent with these purposes.

[16] Certainly a primary purpose of the Court Reform Act was to remove local matters from the federal courts, especially the trial of local crimes. As the House Report states, "[t]he fundamental reason for reorganization of the District of Columbia courts is the soaring crime rate." H.R.Rep. No. 91-907, *supra*, at 25. The Senate Committee Report notes the anomaly "inherent in burdening a Federal district court with sole general jurisdiction over the full panoply of local legal matters. The burden is acute in the District of Columbia, the seat of the Federal Government, where . . . a substantial and greater quantum of genuinely Federal litigation might best and conveniently be brought." S.Rep. No.

91-405, *supra*, at 3. Perhaps the best explication of of what Congress was attempting to accomplish was Justice White's in *Palmore*:

> Congress had concluded that there was a crisis in the judicial system of the District of Columbia, that case loads had become unmanageable, and that neither those matters of national concern nor those of strictly local cognizance were being promptly tried and disposed of by the existing court system. The remedy in part, was to relieve the regular Art. III courts, that is, the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, from the smothering responsibility for the great mass of litigation, civil and criminal, that inevitably characterizes the court system in a major city and to confine the work of those courts to that which, for the most part, they were designed to do, namely, to try cases arising under the Constitution and the nationally applicable laws of Congress. The other part of the remedy, equally essential, was to establish an entirely new court system with functions essentially similar to those of the local courts found in the 50 states of the Union with responsibility for trying and deciding those distinctively local controversies that arise under local law including local criminal laws having little, if any, impact beyond the local jurisdiction.

411 U.S. at 408-09, 93 S.Ct. at 1682.

We think that this Congressional purpose has been fully carried out by the transfer of jurisdiction over

local crimes to Superior Court. *See, e.g., Washington Post*, Apr. 20, § B, p. 1, col. 7. The transfer of trial jurisdiction effectuates the goal of swift justice; the question of post-collateral relief does not affect that process at all.[40] More importantly, the fourth amendment claim appellant advances is not a "purely local matter;" it is a case arising under the Constitution, a matter to which our citizens have always had recourse to the article III courts. Congress, in delineating the purposes behind Court Reform, carefully distinguished between "local" and "federal" business, and appellant's construction of section 110 is harmonious with that congressional scheme.

We find one final indicium of legislative intent. As we have seen, the legislative history contains no debate or discussion of section 110's considerable jurisdictional impact or its possible unconstitutionality. In contrast, proposals in recent years which would affect the habeas jurisdiction of the Federal courts have sparked considerable debate and controversy concerning both their desirability and constitutionality.

In 1968, Congress had before it, as part of a crime control act, a proposed statute, the intended effect of which was to eliminate post-conviction federal habeas

[40] This conclusion is reinforced by the fact that all parties concede that Congress did not divest the district court's authority to entertain pre-trial writs.

relief for state prisoners.[41] The extensively debated proposal was opposed upon constitutional grounds,[42]

[41] *See* 114 Cong.Rec. 11186 (1968). Section 702 of the bill, which would have added to title 28 of the United States Code, section 2256 to read:

> The judgment of a court of a State upon a plea or verdict of guilty in a criminal action shall be conclusive with respect to all questions of law or fact which were determined, or which could have been determined, in that action until such judgment is reversed, vacated, or modified by a court having jurisdiction to review by appeal or certiorari such judgment; and neither the Supreme Court nor any inferior court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to reverse, vacate, or modify any such judgment of a State court except upon appeal from, or writ of certiorari granted to review, a determination made with respect to such judgment upon review thereof by the highest court of the State having jurisdiction to review such judgment.

id. at 11189.

[42] Senator Joseph Tydings, a leading opponent of the bill, solicited and introduced the views of 212 legal scholars from 43 law schools on the constitutional issues involved. *See* 114 Cong. Rec. 13850-13867 (1968). Senator Tydings delivered an extensive speech on the Senate floor on those issues, and was engaged in debate specifically focusing on the proposal's constitutional vitality. Id. at 13990-97. *See also id.* at 14136-37. Perhaps the most adamant constitutional viewpoint advanced was Minority Leader Scott's:

> If Congress tampers with the great writ, its action would have about as much chance of being held constitutional as the celebrated celluloid dog chasing the asbestos cat through hell.

id. at 14183.

It is noteworthy that Senator Tydings, a leading constitutional opponent of the proposed 1968 changes, was a prime

and apparently was dropped for that reason. *See* 119 Cong.Rec. 2221 (1973) (Remarks of Sen. Hruska). In 1973, another bill was introduced affecting federal habeas jurisdiction. *See* S. 567, 93rd Cong., 1st Sess. (1973). *See generally* Note, Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation? 61 Geo.L.J. 1221 (1973). Once again, the constitutional considerations were extensively set out.[43]

[17] We find the congressional silence, when contrasted with the extended constitutional debates over other proposals, both "curious"[44] and significant.

---

advocate for the Court Reform Act, serving as Chairman of the Senate Committee on the District of Columbia and presiding at hearings which eventually lead to the Act. Hearings on § 1066 Before the Senate Comm. on the District of Columbia and the Senate Subcomm. of the Comm. on the Judiciary, 91st Cong., 1st Sess., pt. 3 at ii, 467 (1969).

[43] *See* 119 Cong.Rec. 2220-2247 (1973). The bill would have limited federal post-conviction review to cases involving a claimed constitutional violation which "presents a substantial question," which was not and could not be raised in a state proceeding, which "has as its primary purpose the protection of the reliability of . . . the fact finding process," and which probably would have produced a different result if the violation had not occurred. Section 2255 would have been similarly amended. *Id.* at 2222.

[44] "Is there any point to which you would wish to draw my attention?"

"To the curious incident of the dog in the night-time."
The dog did nothing in the night-time."

"That was the curious incident," remarked Sherlock Holmes.

A. Doyle, *Silver Blaze, The Complete Sherlock Holmes,* 347 (1930).

While these other proposals would have affected more prisoners than section 110, the district court's interpretation of that statute more completely eliminated article III review of District prisoners' claims. The most logical inference which may be drawn from this silence is that Congress never intended section 110 to affect the district court's jurisdiction.

We have failed to discern even a glimmer of legislative history to support the view that Congress intended to effectuate a substantial reduction in jurisdiction and to take us to the constitutional frontiers which have heretofore remained, perhaps deliberately, undefined. In Brown v. Allen, *supra,* the Supreme Court rejected a contention that Congress intended 28 U.S.C. § 2254 to eliminate the right of a state prisoner to apply for habeas relief in the lower federal courts, stating: "We are unwilling to conclude without a definite congressional direction that so radical a change was intended." 344 U.S. at 450, 73 S.Ct. at 404. As the Court said in another situation:

> We are asked to conclude that Congress, . . . without a suggestion as to the effect, or a word of debate as to the desirability, of so fundamental a change, nevertheless, by failing to alter the identifying words of [the operative statute], . . . has radically modified a statute always theretofore maintained and considered as of great importance. It is inconceivable that a rule in force from the beginning of the government, a part of our history as well as our law, welded into the structure of our national policy by a century of legislative and administrative acts

> and judicial decisions, would have been deprived of its force in such dubious and casual fashion.

Ozawa v. United States, 260 U.S. 178, 194, 43 S.Ct. 65, 68, 67 L.Ed. 199 (1922). We endorse those sentiments here.

D

[18] There is one remaining indication that we are on firm ground in our approach to the statute: the Supreme Court's treatment of cases which raised the spectre that recourse through habeas corpus to the article III courts to test the legality of detention would not be available. In each case, the Court has rejected such a construction of the relevant statute. We have already noted the Court's refusal to accept an interpretation of 28 U.S.C. § 2254 which would have permanently consigned constitutional claims of state prisoners to the state courts, *see* Brown v. Allen, *supra* and its avoidance of the problem for 28 U.S.C. § 2255 by holding that section to be exactly commensurate to habeas corpus. *See* Sanders v. United States, *supra*; United States v. Hayman, *supra*. Another example of the Court's approach is its treatment of the immigration laws. Time and again, the Court faced statutes which made executive determinations final, did not provide for judicial review, and could be construed to repeal the federal court's habeas jurisdiction.[45] In every case,

[45] *See* Act of May 6, 1882, 22 Stat. 58, as amended, Act of July 5, 1884, 23 Stat. 115. *See also* Act of March 3, 1891, 26 Stat. 1085:

[Footnote continued on page 43a]

the Court found jurisdiction. *See* The Japanese Immigrant Case, 189 U.S. 86, 23 S.Ct. 611, 47 L.Ed. 721 (1903);[46] United States v. Jung Ah Lung, 124 U.S. 621, 8 S.Ct. 663, 31 L.Ed. 591 (1888).[47] *See also* Chin Yow v. United States, 208 U.S. 8, 28 S.Ct. 201, 52 L.Ed. 369 (1908).

---

[45] [Continued]

> All decisions made by the inspection Officers or their assistants touching the right of any alien to land, when adverse to such right, *shall be final* unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury.

(emphasis added); 28 Stat. 390 (1894):

> In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, *shall be final*, unless reversed on appeal to the Secretary of the Treasury.

(Emphasis added).

[46] In this case, the Court noted: "An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with . . . absolute and arbitrary power . . . ." The Japanese Immigrant Case, 189 U.S. 86, 101, 23 S.Ct. 611, 615, 47 L.Ed. 721 (1903).

[47] In this case, it was argued that the right to issue the writ "was taken away by the Chinese restriction act, which regulated the entire subject-matter, and was necessarily exclusive." United States v. Jung Ah Lung, 124 U.S. at 626, 8 S.Ct. at 666. The Court, however, concluded: "We see nothing in these acts which in any manner affects the jurisdiction of the courts of the United States to issue a writ of *habeas corpus*." *Id.* at 628-29, 8 S.Ct. at 666.

Perhaps the most relevant analogy involves the military justice system, created, like the local District of Columbia courts, pursuant to Congress' article I powers. The inferior article II courts traditionally have had habeas jurisdiction over persons detained by authority of the military justice system. *See, e.g.*, Ex parte Reed, 100 U.S. 13, 25 L.Ed. 538 (1879). In 1948, Congress enacted a collateral attack remedy within the military justice system itself. 62 Stat. 639 (1948). The statute stated that these collateral attack proceedings were "final and conclusive" and "binding upon *all* departments, *courts*, agencies, and officers *of the United States*." This provision, as easily as section 110(g), could be read to preclude further resort to the article III courts. However, faced with this construction and the complementary argument that it resulted in suspension of the Writ, the Court in Gusik v. Schilder unanimously held:

> We read the finality clause . . . as doing no more than describing the terminal point for proceedings within the court-martial system. If Congress had intended to deprive the civil courts of their habeas corpus jurisdiction, which has been exercised from the beginning, the break with history would have been so marked that we believe the purpose would have been made plain and unmistakable. The finality language so adequately serves the more restricted purpose [of exhaustion] that we would have to give a strained construction in order to stir the constitutional issue that is tendered.

340 U.S. 128, 132-33, 71 S.Ct. 149, 152, 95 L.Ed. 146 (1950) (footnote omitted). This language is equally applicable here.

E

[19] In light of our analysis in this part of the opinion, we reject the district court's and the Government's construction of section 110 as unsupported by the specific legislative intent behind the section and the general purposes behind the Court Reform Act. Recognizing that courts should interpret statutes to avoid difficult constitutional questions and that the constitutional questions raised are both novel and difficult, and that the Supreme Court has repeatedly avoided this problem by construing statutes not to affect jurisdiction, we find that Congress never intended to, nor does section 110 actually, affect the district court's jurisdiction to entertain post-conviction habeas petitions from local prisoners. Instead, we hold that section 110(g) is an exhaustion of remedies statute, requiring initial submission of claims to the local courts and marking, as did the statute in Gusik, the terminal point for proceedings in the local court system. This construction is consistent with the statute, the state court analogy for the Superior Court, *see* 28 U.S.C. § 2254(b), (c) (1970); Fay v. Noia, *supra*, 372 U.S. at 418-20, 83 S.Ct. 822, and federal habeas review of custody imposed by article I courts. *See* Noyd v. Bond, 395 U.S. 683, 693-94, 89 S.Ct. 1876, 23 L.Ed. 631 (1969); Gusik v. Schilder, *supra*, 340 U.S. at 131-32, 71 S.Ct. 149.

III

Having determined that the district court may entertain petitions brought by prisoners convicted in Superior Court, the question still remains whether appellant properly may maintain his petition at this time. We hold that Palmore properly invoked jurisdiction under 28 U.S.C. § 2241(c)(3) and has sufficiently exhausted his local remedies to maintain his petition.

28 U.S.C. § 2241(c) reads in part:

> The writ of habeas corpus shall not extend to a prisoner unless—
>
> * * * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States;
>
> * * * * *

[20, 21] Palmore is released on bail, *see* note 3 *supra*, which constitutes custody within the meaning of section 2241. *See* Hensley v. Municipal Court, 411 U.S. 345, 348-53, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973); United States ex rel. Russo v. Superior Court, 483 F.2d 7, 12 (3d Cir.), cert. denied, 414 U.S. 1023, 94 S.Ct. 447, 38 L.Ed.2d 315 (1973). His application for the writ alleged, *inter alia*, that he is in custody in violation of the fourth amendment of the Constitution, a recognized basis for collateral relief. 28 U.S.C. § 2241(c) (1970); Kaufman v. United States, 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed. 2d 227 (1969).

[22-24] The final issue is whether appellant has exhausted his local remedies as required by section 110(g). Toward that end, we may usefully draw upon the principles of comity which have emerged from the exhaustion of state remedies requirement, now codified in 28 U.S.C. § 2254.[48] Applying these principles, we think that Palmore has sufficiently exhausted his local remedies despite not having made a motion under section 110. The fourth amendment issue was fully tendered to the Superior Court and the District of Columbia Court of Appeals; those courts fully considered and rejected the claim. The exhaustion requirement does not require prisoners to make futile gestures. "[O]nce the federal claim has been fairly presented to the [local] courts, the exhaustion requirement is satisfied." Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed. 2d 438 (1971); *see* Francisco v. Gathright, 419 U.S. 59, 63, 95 S.Ct. 257, 42 L.Ed.2d 226 (1974); Wilwording v. Swenson, 404 U.S. 249, 250, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971); Roberts v. LaVallee, 389 U.S. 40, 42-43, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967); Brown v. Allen, *supra*, 344 U.S. at 447-

---

[48] Applying those principles furthers the federal-state analogy behind the Court Reform Act. *See* note 39 *supra* and accompanying text. In fact, not applying the same exhaustion requirements to local District of Columbia prisoners would raise severe equal protection problems. *See* notes 25-31 *supra* and accompanying text. The Government implicitly recognizes this by conceding "there may well be some question as to whether" Palmore need exhaust further remedies. Gov't Br. at 31.

50, 73 S.Ct. 397. Thus, appellant's application for the writ is timely, and he is entitled to consideration on the merits by the district court.[49]

In conclusion, we emphasize what we do and do not hold today. We hold that section 110(g) does not affect article III habeas jurisdiction. We do so after concluding that Congress never intended that result; if our interpretation is erroneous, Congress stands available to enlarge upon or clarify the statute. *See* Border Pipe Line Co. v. FPC, 84 U.S.App.D.C. 142, 171 F.2d 149 (1948). We reach no decision on the constitutional issues raised here; while their substantiality affected our consideration of the statute, demarcation of the extent of the constitutional restraints that the equal protection guarantee and the supension clause impose upon Congress' power to allocate jurisdiction must await the day Congress more explicitly asserts that power.

[25] Lastly, we do not believe that our decision thrusts the federal courts into a supervisory role over the local courts of the District of Columbia, nor does it upset the reorganization Congress established in the Court Reform Act. All claims must be presented in the first instance to the local courts. Those judges, who also swear to uphold the Constitution, undoubtedly can and will vindicate the

---

[49] Appellant urges us to reach the merits of his petition. Appellant's Br. at 48-50. We do not believe the interests of justice require the extraordinary course of *de novo* consideration of the merits by this *en banc* court and instead remand the case.

rights of the District's citizens. We merely reaffirm that if the local courts withhold effective remedy, the federal courts have the power and the duty to provide it.

The judgment of the district court is reversed and the case remanded for consideration on the merits.

So ordered.

ROBB, Circuit Judge (dissenting):

The majority concludes that 23 D.C. Code § 110 (g) (1973) is merely an exhaustion of remedies requirement and was not intended by Congress to affect the habeas corpus jurisdiction of the federal courts. I am unable to accept this conclusion. Subsection (g) of section 110 provides that "[a]n application for a writ of habeas corpus . . . *shall not be entertained . . . by any Federal . . . court* if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." [Emphasis supplied.] Without laboring the point, I think this plain language means exactly what it says.

Since I reject the premise upon which the majority avoids what it considers to be difficult constitutional questions I turn briefly to those questions.

The majority suggests that there may be merit in the argument "that section 110 is not exactly com-

mensurate to habeas corpus both because it is inadequate to protect the interests which mandate ultimate article III review of questions involving constitutional liberty and because it entrusts that task to judges who do not possess the tenure and salary protections which lie at the heart of the independence of the federal judiciary." I note that the relief available in the Superior Court under 23 D.C. Code § 110 (1973) is the equivalent of that available in a federal court under 28 U.S.C. § 2255; and the Supreme Court has held that the scope of 28 U.S.C. § 2255 is "exactly commensurate" with the scope of federal habeas corpus. Sanders v. United States, 373 U.S. 1, 13-14, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963); Hill v. United States, 368 U.S. 424, 427, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962). *See* United States v. Hayman, 342 U.S. 205, 209, 72 S.Ct. 263, 96 L.Ed. 232 (1952). The relief defined in section 110, therefore, is the equivalent of federal habeas corpus relief. Consequently, the basis for the argument that "section 110 is not exactly commensurate to habeas corpus" is reduced to the difference in the tenure and salary protections accorded District Court and Superior Court judges.

I think the argument suggested by the majority is answered in principle by Palmore v. United States, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973). In that case the Supreme Court held that a defendant charged with a felony under the District of Columbia Code may be tried by a judge who does not have tenure and salary protection under Article III of the Constitution; that "under its Art. I, § 8, cl.

17, power to legislate for the District of Columbia, Congress may provide for trying local criminal cases before judges who, in accordance with the District of Columbia Code, are not accorded life tenure and protection against reduction in salary." 411 U.S. at 390, 93 S.Ct. at 1672. If without the dilution of his constitutional rights a man may be tried and sentenced to the penitentiary by an Article I judge of the Superior Court, I see no reason why he may not be limited to that same court when applying for collateral post-conviction relief. A prisoner's constitutional rights are no more diluted and he is no more disadvantaged in the one case than in the other. In both cases review may be had in the United States Supreme Court. The Article I courts held competent to administer the District of Columbia's criminal justice system exclusive of Article III courts are perforce competent to dispense collateral post-conviction relief exclusive of the habeas corpus jurisdiction of Article III courts.

The majority also suggests that section 110(g) as construed by the government, may deny a prisoner convicted in the District of Columbia court equal protection of the law by prohibiting collateral review in an Article III court, a remedy available to all prisoners convicted in state courts. Once more I think Palmore v. United States, 411 U.S. at 410, 93 S.Ct. 1670, answers the argument. As the *Palmore* decision establishes, there is no invidious discrimination when a person in the District of Columbia is tried in an Article I court for a violation of an act of Con-

gress, applicable only within the District, although elsewhere in the United States he would be tried in an Article III court for any violation of a general federal statute. I think it follows that it is not a denial of equal protection when that person is required to present his application for collateral relief to an Article I District of Columbia court. Again, equal protection is denied no more in the one case than in the other. United States v. Thompson, 147 U.S.App.D.C. 1, 452 F.2d 1333 (1971), cert. denied, 405 U.S. 998, 92 S.Ct. 1251, 31 L.Ed.2d 467 (1972), relied upon by the appellant, does not require a contrary conclusion. In that case, as the majority here notes, the standards for release on bail under the District of Columbia statute were harsher than those of the Federal Bail Reform Act. In the case before us however the District of Columbia courts will be governed by the same standards applicable in federal Article III courts; and any improper deviation from such standards will be subject to correction by the Supreme Court of the United States.

I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1832

September Term, 1974

Habeas Corpus 31-73

ROOSEVELT F. PALMORE, APPELLANT

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
ET AL.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Before: BAZELON, Chief Judge, WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON, MacKINNON, ROBB and WILKEY, Circuit Judges, sitting *en banc*

JUDGMENT

This cause came on to be heard by the Court sitting *en banc* and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court *en banc* that the judgment of the District Court appealed from in this cause is hereby reversed and

this case is hereby remanded to the District Court, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Date: July 9, 1975

Opinion for the Court filed by Circuit Judge Tamm.

Dissenting opinion filed by Circuit Judge Robb.

[Filed Jul. 9, 1975, United States Court of Appeals for the District of Columbia, Hugh E. Kline, Clerk]

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROOSEVELT F. PALMORE, PETITIONER

v.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, ET AL., RESPONDENT

[Filed Jul. 15, 1974, James E. Davey, Clerk]

Habeas Corpus No. 31-73

ORDER DISCHARGING RULE TO SHOW CAUSE AND DISMISSING PETITION

Upon consideration of the application for a Writ of Habeas Corpus filed herein, the Order to Show Cause, the return and answer of respondents, the several memorandums of law filed by the parties and the arguments of counsel, and it appearing to the Court that Congress has deprived this Court of jurisdiction by providing in 23 D.C. Code § 110(a) that post-conviction collateral attack upon convictions in the Superior Court of the District of Columbia may be made by motion in that court, and by directing in § 110(g) that

> "An application for a writ of habeas corpus in behalf of a prisoner who was authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the

applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by law is inadequate or ineffective to test the legality of his detention"

and it further appearing that the applicant herein is authorized by Title 23, D.C. Code § 110(a) to apply for relief by motion . t has failed to do so, and it further appearing that there is no showing that the Superior Court has denied him relief or that the remedy by motion is inadequate and ineffective to test the legality of his detention, it is by the Court this 10th day of July, 1974,

ORDERED, that the Rule to Show Cause be, and the same hereby is, discharged and the Petition for a Writ of Habeas Corpus is dismissed.

/s/ Joseph C. Waddy
JOSEPH C. WADDY
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

No. 73-1975

JASPER C. PRESSLEY, APPELLANT

v.

C. L. SWAIN

Argued April 24, 1975.

Decided July 9, 1975.

Appeal from the United States District Court for the District of Columbia

(D.C. Habeas Corpus 30-73)

Mark W. Foster, Washington, D.C. (appointed by this Court), for appellant in No. 73-1975. Robert M. Weinberg, Washington, D.C. (appointed by this Court), entered an appearance for appellant in No. 73-1975.

Albert H. Turkus, Asst. U.S. Atty., with whom Earl J. Silbert, U.S. Atty., John A. Terry, Warren R. King, Craig M. Bradley, and Tobey W. Kaczensky, Asst. U.S. Attys., were on the brief for appellee.

Before BAZELON, Chief Judge, and WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON, MacKINNON, ROBB and WILKEY, Circuit Judges, sitting en banc.

Opinion for the Court filed by Circuit Judge TAMM.

TAMM, Circuit Judge:

Along with Palmore v. Superior Court, —— U.S. App.D.C. ——, 515 F.2d 1294, this case considers whether 23 D.C.Code § 110(g) (1973) eliminates the habeas corpus jurisdiction of the United States District Court for the District of Columbia for prisoners convicted in Superior Court. Finding that 23 D.C. Code § 110(g) does not divest jurisdiction and that appellant has exhausted his remedies, we reverse the judgment of dismissal by the district court and remand for consideration on the merits.

Appellant was convicted in April, 1971 of grand larceny and larceny from the Government and sentenced to concurrent prison terms of twenty-two to ninety-six months and twenty months to five years respectively. His conviction was affirmed by the District of Columbia Court of Appeals. Pressley v. United States, No. 6063 (D.C.Ct.App., decided May 22, 1972).

On June 5, 1972, appellant, *pro se*, filed a motion for a new trial, claiming *inter alia*, ineffective assistance of counsel; the motion was denied without a hearing, and Pressley appealed. Counsel was appointed, and after full briefing and argument, the District of Columbia Court of Appeals again affirmed. Pressley v. United States, No. 6631 (D.C.Ct.App., decided March 2, 1973).

In July, 1972, during the pendency of his second appeal, Pressley filed another *pro se* motion to compel production of the grand jury voting record in his case. The trial judge dismissed the motion for want

of jurisdiction. Again after full briefing and argument by appointed counsel, the District of Columbia Court of Appeals affirmed, not on the jurisdictional ground, but on the merits. Pressley v. United States, No. 6803 (D.C.Ct.App., decided July 6, 1973).

On May 23, 1973, appellant filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the District of Columbia, alleging that his custody violated his constitutional rights to due process and effective assistance of counsel. On July 18, 1973, the district court dismissed the petition, stating that "this Court does not have jurisdiction over this matter, by virtue of 23 D.C.Code § 110 (g)." Pressley v. Swain, Habeas Corpus No. 30-73 (D.D.C., filed July 18, 1973).

Pressley appealed to this court, which on October 30, 1974, *sua sponte* remanded the record to the district court for clarification of its order. Specifically, we instructed that

> [t]he District Court should indicate whether, in ruling that he was without jurisdiction to entertain the petition for a writ of habeas corpus under 23 D.C.Code § 110(g), he considered the applicant as one who had exhausted his remedies in the local court system, or whether he ruled only that he was without jurisdiction because the applicant had not first sought a writ of habeas corpus in Superior Court as required by 16 D.C.Code § 1901(c) and 23 D.C.Code § 110 (a).

Pressley v. Swain, No. 73-1973 (D.C.Cir., Oct. 30, 1974).

On remand, the district court "respectfully advise[d] that on the papers then before it, it appeared that appellant had not adequately exhausted his remedies in the local court system. The Court made no determination as to the constitutionality of 23 D.C. Code § 110." Pressley v. Swain, Habeas Corpus No. 30-73 (D.D.C., Nov. 12, 1974). The court continued that "[i]t was not apparent that the suppression issue had ever been analyzed and there were aspects of the adequacy of counsel not passed upon at the local level. . . . The Court did not feel the question of the ultimate effect of 23 D.C.Code § 110 upon the viability of a further writ of habeas corpus in the District Court was ripe for decision in this case." *Id.*

Appellant now contends that the district court has jurisdiction to entertain petitions for habeas corpus, even after passage of section 110(g), and that he has exhausted his local remedies, having litigated every aspect of his claim in the local courts. The Government contests the district court's jurisdiction, but concedes that Pressley has exhausted his local remedies:

> regardless of whether appellant has actually exhausted his local remedies by an application to the Superior Court under 23 D.C.Code § 110, under the special circumstances of this case—where it is clear that the local court system has had a full opportunity to resolve the issues raised in appellant's petition—appellant should not be forced to relitigate his claim in the local court system before filing a petition in the District Court.

Response to Appellant's Supplemental Memorandum Directed to the Issue of Exhaustion of Local Remedies at 7 (footnotes omitted). We agree with appellant both as to jurisdiction and exhaustion.

[1-3] Today in Palmore v. Superior Court, *supra*, we held that section 110(g) does not affect the jurisdiction of the district court under 28 U.S.C. §§ 2241 *et seq.* and operates only as an exhaustion of remedies provision. We therefore must determine whether Pressley meets the requirements of section 2241. Since Pressley has been placed on parole through April, 1979, Gov't. Br. at 3 n.2, he is in custody within the meaning of section 2241. *See* Jones v. Cunningham, 371 U.S. 236, 239-44, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963). Appellant alleges that he is in custody in violation of his fifth amendment right to due process and his sixth amendment right to effective assistance of counsel; that suffices as a claim of "custody in violation of the Constitution." Thus, if the exhaustion requirement is met, Pressley has fulfilled all the conditions to maintaining his petition.

[4] Appellant argues that the district court erred in concluding that he failed to exhaust his remedies in the local court system. We agree. Pressley's two *pro se* collateral attack motions, which he styled "Motion for a New Trial," were, as such, clearly untimely under Super.Ct.R.Crim.P. 33. The Government, in opposing the motion on the merits, argued that compliance with rule 33 was jurisdictional, but then stated:

should this Court decide to review appellant's argument on the merits (*i.e., by treating his motion for new trial as a motion to vacate sentence under 23 D.C.Code § 110 (Supp.V, 1972);* cf. 28 U.S.C. § 2255), we submit that it is utterly meritless.

Supplemental Memorandum Directed to the Issue of Exhaustion of Local Remedies at 8 n.25 (emphasis added). *See also id.* (Gov't. in last local appeal "characterized the motion on appeal as a motion to vacate sentence under 23 D.C.Code § 110 (Supp. V, 1972)").

"[A]djudication upon the underlying merits of claims is not hampered by reliance upon the titles petitioners put upon their documents." Andrews v. United States, 373 U.S. 334, 338, 83 S.Ct. 1236, 1239, 10 L.Ed.2d 383 (1963); *See* Hill v. United States, 368 U.S. 424, 430, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962). This rule applies with special force to *pro se* motions. We therefore agree with appellant that "[b]y any reasonable analysis, [his] 'Motion for a New Trial' was in fact a collateral attack under 23 D.C.Code § 110." Supplemental Memorandum, *supra*, at 16 n.32. Both motions were considered on their merits by the District of Columbia Court of Appeals. Despite its silence on the issue in its opinions, we think it fair to say that the District of Columbia Court of Appeals treated the motions in that manner. Hence, it is plain that Pressley has exhausted his local remedies by first pursuing his claim through a motion under section 110.

Under any circumstance, no matter how the motions were styled, the local courts fully considered the constitutional claims on the merits. Thus, the local courts "had a full opportunity to determine the federal constitutional issues before resort was made to a federal forum, and the policies served by the exhaustion requirement would not be furthered by requiring submission of the claims to the [local] courts." Francisco v. Gathright, 419 U.S. 59, 63, 95 S.Ct. 257, 42 L.Ed.2d 226 (1974) (citations and footnotes omitted).

We hold that the district court erred in dismissing the petition on exhaustion grounds and reverse and remand for consideration on the merits.

So ordered.

ROBB, Circuit Judge (dissenting):

For the reasons stated in my dissent in Palmore v. Superior Court, —— U.S.App.D.C. ——, 515 F.2d 1294, I dissent.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

No. 73-1975

Habeas Corpus 30-73

JASPER C. PRESSLEY, APPELLANT

v.

C. L. SWAIN

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: BAZELON, Chief Judge, WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, Circuit Judges, sitting *en banc*

JUDGMENT

This cause came on to be heard by the Court sitting *en banc* and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by the Court *en banc* that the judgment of the District Court appealed from in this cause is hereby reversed and this case is hereby remanded to the District Court, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk

Date: July 9, 1975

Opinion for the Court filed by Circuit Judge Tamm.

Dissenting opinion filed by Circuit Judge Robb.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 30-73

JASPER C. PRESSLEY, PETITIONER

v.

C. L. SWAIN, RESPONDENT

ORDER

This matter having come before the Court on July 16, 1973 on a petition for a writ of habeas corpus, the rule to show cause having been issued; whereupon, the Court having considered the petition, the answer and supplemental answer thereto, the reply of petitioner and the answer to reply of petitioner and argument of counsel adduced in open court, it is by the Court this 19th day of July, 1973,

ORDERED that the rule to show cause be discharged and the petition dismissed as this Court does not have jurisdiction over this matter, by virtue of 23 D.C. Code § 110(g).

/s/ Gerhard A. Gesell
Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Habeas Corpus No. 30-73

JASPER C. PRESSLEY, PETITIONER

v.

C. L. SWAIN, RESPONDENT

MEMORANDUM

In response to the *sua sponte* Per Curiam Order of the United States Court of Appeals for the District of Columbia Circuit directing this Court to clarify its Order of dismissal for lack of jurisdiction, this Court respectfully advises that on the papers then before it, it appeared that appellant had not adequately exhausted his remedies in the local court system. The Court made no determination as to the constitutionality of 23 D.C. Code § 110. This issue was not directly raised.

It is apparent from the long history of Federal Court habeas corpus involving collateral attack on local judgments that this United States District Court will be well advised to refuse to accept jurisdiction without a clear demonstration that petitioner has exhausted all appropriate remedies at the local level. Where the local court action in the District of Columbia leaves in doubt whether constitutional issues have or have not been explicitly resolved by

the highest court, the remedy of habeas corpus in such cases should first be thoroughly pursued locally in the interests of clarity. If this procedure is followed, the highest local court can rule precisely, noting the underlying papers on which it relies. If habeas then subsequently lies to the District Court, the application can be efficiently processed. It will defeat the administration of justice in the District of Columbia to place upon the United States District Court a broad jurisdiction, in effect, to rummage through local court papers searching definite indication that an issue has or has not been specifically considered and resolved. The District Court should not drift into a situation where, in effect, it appears to act as a super-appellate reviewing court wherever constitutional issues are presented in local criminal trials. The fact that the local court is an Article I court in a special relationship to the United States District Court emphasizes the wisdom of confining constitutional issues to that court whenever possible so that the "humiliation of review" and the other matters of efficiency covered by Mr. Justice Powell in his concurring opinion in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250, 264 (1973), can be avoided. Insistence on procedural precision will do much to accomplish this result.

It was with these general considerations in mind that the Court acted as it did in the instant case. It was not apparent that the suppression issue had ever been analyzed and there were aspects of the adequacy of counsel not passed upon at the local

level. The writ should have been initially filed in the local courts. The Court did not feel the question of the ultimate effect of 23 D.C. Code § 110 upon the viability of a further writ of habeas corpus in the District Court was ripe for decision in this case.

/s/ Gerhard A. Gesell
United States District Judge

November 12, 1974.

Serve:

Mark W. Foster, Esquire
Public Defender Service
601 Indiana Avenue, N.W.
Washington, D.C. 20004
Counsel for Petitioner

Albert H. Turkus, Esquire
Assistant United States Attorney
Washington, D.C.
Counsel for Respondent

Robert M. Weinberg, Esquire
Bredhoff, Cushman, Gottesman & Cohen
1000 Connecticut Avenue, N.W.
Washington, D.C.

APPENDIX H

1. *Constitutional Provisions*

Article I, Section 8 of the Constitution provides in pertinent part:

> The Congress shall have Power * * *
>
> * * * * *
>
> [cl. 9] To constitute Tribunals inferior to the supreme Court;
>
> * * * * *
>
> [cl. 17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *.

Article I, Section 9, cl. 2 provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Article III, Section 1 of the Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which not be diminished during their Continuance in Office.

Article III, Section 2 of the Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *.

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. *United States Code Provisions*

28 U.S.C. 2241 provides in pertinent part:

> § 2241. Power to grant writ.
>
> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. * * *
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. 2243 provides in pertinent part:

§ 2243. Issuance of writ; return; hearing; decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

* * * * *

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

* * * * *

28 U.S.C. 2254 provides in pertinent part:

§ 2254. State custody; remedies in State courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by any application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determina-

tion of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

* * * * *

28 U.S.C. 2255 provides:

§ 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause

notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

3. *District of Columbia Code Provision*

23 D.C. Code 110 provides:

(a) A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.

(b) A motion for such relief may be made at any time.

(c) Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. If the court finds that (1) the judgment was rendered without jurisdiction, (2) the sentence imposed was not authorized by law or is otherwise open to collateral attack, (3) there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner, resentence him, grant a new trial, or correct the sentence, as may appear appropriate.

(d) A court may entertain and determine the motion without requiring the production of the prisoner at the hearing.

(e) The court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

(f) An appeal may be taken to the District of Columbia Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(g) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 598301 139